

1 UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF TEXAS

3 SHERMAN DIVISION

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6 LINDA FREW, ET AL

]

CASE NO. 3:93CV65

7 VS.

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9 AM, SEPTEMBER 9, 2013

8 KYLE JANEK, ET AL

]

PLANO, TEXAS
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11 REPORTER'S TRANSCRIPT OF MOTION HEARING

12
13 PAGES 1 THROUGH 173

14
15 CONCORDANCE, PAGE 150

16
17 THE HONORABLE RICHARD SCHELL, U.S. DISTRICT JUDGE, PRESIDING

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24 PROCEEDINGS REPORTED IN REALTIME USING COMPUTERIZED STENOTYPE,
25 TRANSCRIPT PRODUCED USING COMPUTER-AIDED TRANSCRIPTION.

1 [COURT REPORTER'S NOTES 20130909, 9 AM, MONDAY,
2 SEPTEMBER 9, 2013, PLANO, TEXAS, U.S. DISTRICT JUDGE RICHARD
3 SCHELL PRESIDING]

4 APPEARANCES:

5 FOR THE PLAINTIFFS: JANE KATHRYN SWANSON
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10 AND

11 TIMOTHY B. GARRIGAN
12 ATTORNEY AT LAW
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24 AND
25

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AND

JENNIFER KAUFMAN

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08:28AM

09:06AM

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09:06AM

THE COURT: THANK YOU. PLEASE TAKE YOUR SEATS.

THE STYLE OF THIS CASE IS "LINDA FREW AND OTHERS
VERSUS DR. KYLE JANEK AND OTHERS," CASE NUMBER 3:93CV65.

I HAVE HERE REPRESENTING THE PLAINTIFFS JANE SWANSON
AND TIMOTHY GARRIGAN. GOOD MORNING.

MS. SWANSON: GOOD MORNING.

MR. GARRIGAN: GOOD MORNING.

09:06AM 1 THE COURT: AND REPRESENTING THE STATE OF TEXAS
09:06AM 2 I HAVE JAMES "BEAU" ECCLES. GOOD MORNING.

09:06AM 3 MR. ECCLES: GOOD MORNING, YOUR HONOR.

09:07AM 4 THE COURT: LET'S SEE. I'M NOT SURE WHO IS A LAWYER
09:07AM 5 AND WHO IS NOT, BUT MICHELLE LONG IS HERE. GOOD MORNING TO
09:07AM 6 YOU.

09:07AM 7 MS. LONG: GOOD MORNING.

09:07AM 8 THE COURT: LINDA HALPERN, LORETTA DISNEY, MATTHEW
09:07AM 9 MALERICH AND JENNIFER KAUFMAN.

09:07AM 10 MS. KAUFMAN: YES. GOOD MORNING.

09:07AM 11 THE COURT: GOOD MORNING.

09:07AM 12 MR. ECCLES: JUST BY QUICK BACKGROUND, YOU MAY
09:07AM 13 RECALL MICHELLE LONG. SHE'S THE HHSC FREW COORDINATOR.

09:07AM 14 THE COURT: YES. SHE WAS HERE AT THE LAST HEARING.

09:07AM 15 MR. ECCLES: SHE WAS. SHE GAVE US BACKGROUND
09:07AM 16 INFORMATION ON THAT OCCASION.

09:07AM 17 LORETTA DISNEY IS A PHARMACIST WITH THE DRUG PROGRAM
09:07AM 18 OF HHSC. SHE, LIKE ALL THESE OTHER FOLKS, IS HERE TO MAKE SURE
09:07AM 19 THAT THE BEST INFORMATION GETS TO YOU. AND IF I DON'T QUITE
09:07AM 20 UNDERSTAND SOMETHING, THEY CAN CORRECT ME SO I DON'T TELL YOU
09:07AM 21 ANYTHING WRONG.

09:07AM 22 THE COURT: OKAY. SO YOU ARE THE ONLY LAWYER HERE
09:07AM 23 FOR THE STATE?

09:07AM 24 MR. ECCLES: LINDA HALPERN IS REJOINING THE CASE.
09:07AM 25 SHE'S AN ASSISTANT ATTORNEY GENERAL. SHE WORKED ON THE FREW

09:08AM 1 CASE YEARS AGO AND SHE'S BACK.

09:08AM 2 THE COURT: OKAY.

09:08AM 3 AND KYLE JANEK IS THE CURRENT COMMISSIONER, IS THAT
09:08AM 4 CORRECT?

09:08AM 5 MR. ECCLES: YES.

09:08AM 6 THE COURT: OKAY.

09:08AM 7 THE COURT SET THIS CASE FOR A HEARING TODAY ON THE
09:08AM 8 PLAINTIFFS' MOTION TO ENFORCE THE CORRECTIVE ACTION ORDER
09:08AM 9 ON PRESCRIPTION AND NONPRESCRIPTION MEDICATIONS, MEDICAL
09:08AM 10 EQUIPMENT AND SUPPLIES, AND DECREE. AND THAT MOTION WAS
09:08AM 11 FILED--WAS DOCKETED AS ENTRY NUMBER 971.

09:08AM 12 THE COURT ALSO SET A HEARING FOR TODAY ON THE
09:08AM 13 DEFENDANTS' RESPONSE AND MOTION TO DISSOLVE THE CORRECTIVE
09:08AM 14 ACTION ORDER ON PRESCRIPTION AND NONPRESCRIPTION MEDICATIONS,
09:08AM 15 MEDICAL EQUIPMENT AND SUPPLIES. AND THAT WAS DOCKETED AS ENTRY
09:09AM 16 998.

09:09AM 17 AND THERE'S ALSO PENDING--AND THERE ARE SOME AGREED
09:09AM 18 MOTIONS THAT ARE PENDING. I'LL SIGN ORDERS ON THOSE. THERE'S
09:09AM 19 ALSO A MOTION TO STRIKE FILED BY THE DEFENDANTS. AND THAT WAS
09:09AM 20 DOCKETED AS ENTRY 1023.

09:09AM 21 SO THE LAST TIME--I'M TRYING TO RECALL--I THINK
09:09AM 22 EARLIER THIS YEAR IT WAS BASICALLY ORAL ARGUMENTS. I DON'T
09:09AM 23 RECALL IF EITHER SIDE PRESENTED EVIDENCE IN TERMS OF TESTIMONY.
09:09AM 24 BUT TODAY ARE THERE ANY WITNESSES THAT WE NEED TO SWEAR IN?

09:09AM 25 MS. SWANSON: NO, YOUR HONOR.

09:09AM 1 MR. ECCLES: NO, YOUR HONOR.

09:09AM 2 THE COURT: OKAY. ALL RIGHT. OKAY.

09:10AM 3 I HAVE THE BASIC BACKGROUND OF WHAT THIS IS ABOUT.

09:10AM 4 AND SO, LET'S SEE, YOU FILED THE FIRST MOTION, MS. SWANSON.

09:10AM 5 HAVE YOU-ALL TALKED ABOUT HOW TO GO ABOUT THIS
09:10AM 6 TODAY?

09:10AM 7 MR. ECCLES: ACTUALLY, WE HAVEN'T. WE HAVE A
09:10AM 8 TRUNCATED MEDICAID BACKGROUND FOR THE PROGRAM ASPECTS OF
09:10AM 9 THE RELEVANT FUNCTIONS OF THE PRESCRIPTION, NONPRESCRIPTION
09:10AM 10 MEDICAL EQUIPMENT PROGRAMMATIC SIDE. I ONLY THOUGHT OF IT
09:10AM 11 LATE LAST WEEK AND SENT IT TO MS. SWANSON ON FRIDAY. SO I
09:10AM 12 UNDERSTAND IF SHE'S COME UP WITH SOME OBJECTIONS OVER THE
09:10AM 13 WEEKEND. I DON'T WANT TO FORCE IT DOWN HER THROAT. IT'S NOT
09:10AM 14 MEANT AS EVIDENCE, IT'S MERELY BACKGROUND. MICHELLE LONG CAN
09:10AM 15 PRESENT THAT. BUT IF SHE PREFERS THAT WE HOLD THAT BACK TO THE
09:10AM 16 ARGUMENT IN OUR CASE, AND IF THE COURT WOULD RATHER WE DO THAT,
09:11AM 17 THAT'S CERTAINLY FINE.

09:11AM 18 THE COURT: AS I SEE THIS CASE--AND TELL ME IF YOU
09:11AM 19 SEE IT DIFFERENTLY--THERE IS THIS CONSENT DECREE THAT WAS
09:11AM 20 ENTERED BY THE COURT BACK IN 1996, AND THEN THERE ARE 11
09:11AM 21 CORRECTIVE ACTION ORDERS THAT WERE APPROVED BY THE COURT IN
09:11AM 22 2007, AND WE HAD A HEARING ON ONE OF THEM EARLIER THIS YEAR. I
09:11AM 23 DON'T HAVE THE ORDER HERE, BUT I GRANTED THE STATE'S MOTION TO
09:11AM 24 BE RELIEVED OF ANY FURTHER RESPONSIBILITY UNDER THAT CORRECTIVE
09:11AM 25 ACTION ORDER.

09:11AM 1 MR. ECCLES: YES, YOUR HONOR.

09:11AM 2 THE COURT: AND SO THERE ARE 10 MORE PENDING, I
09:11AM 3 GUESS, OR THERE ARE 10 MORE FOR WHICH I HAVE NOT ENTERED ANY
09:11AM 4 KIND OF ORDER RELIEVING THE STATE FROM COMPLYING WITH THEM.

09:11AM 5 MR. ECCLES: THAT'S CORRECT.

09:11AM 6 THE COURT: BUT THESE CORRECTIVE ACTION ORDERS
09:11AM 7 EXPIRE AT VARIOUS TIMES, IT LOOKS LIKE. AND SO THE ISSUE FOR
09:12AM 8 THE COURT ON THE CORRECTIVE ACTION ORDER THAT IS THE SUBJECT OF
09:12AM 9 THIS HEARING, WHICH IS CORRECTIVE ACTION ORDER 637-8--AND SOME
09:12AM 10 PARAGRAPHS IN THE CONSENT DECREE--THE ISSUE FOR THE COURT IS
09:12AM 11 WHETHER OR NOT THE STATE HAS COMPLIED WITH WHAT BOTH SIDES
09:12AM 12 AGREED TO IN THE CONSENT DECREE AND THE CORRECTIVE ACTION
09:12AM 13 ORDER. IS THAT THE WAY YOU SEE IT, MS. SWANSON?

09:12AM 14 MS. SWANSON: YES, THAT'S THE WAY WE SEE IT. OUR
09:12AM 15 POSITION IS, THEY HAVE NOT COMPLIED WITH THE RELEVANT PARTS OF
09:12AM 16 THE DECREE OR ALL PARTS OF THE CORRECTIVE ACTION ORDER. AND SO
09:12AM 17 WHAT WE NEED IS AN ENFORCEMENT ORDER TO BRING THEM BACK INTO A
09:12AM 18 STATUS WHERE THEY'RE LIKELY TO BE ABLE TO ACHIEVE COMPLIANCE
09:12AM 19 WITH THE RELEVANT PARTS OF THE CONSENT DECREE.

09:12AM 20 THE COURT: OKAY. HAVE YOU BEEN COUNSEL FOR THE
09:12AM 21 PLAINTIFFS THROUGHOUT THIS LAWSUIT?

09:12AM 22 MS. SWANSON: NOT QUITE THROUGHOUT, YOUR HONOR,
09:12AM 23 BUT I AM AN OLD-TIMER COMPARED TO MANY OTHERS IN THE ROOM.
09:13AM 24 I BECAME INVOLVED IN 1996.

09:13AM 25 THE COURT: OKAY. IT WAS FILED IN '93.

09:13AM 1 MS. SWANSON: YES, IT WAS, BY SUSAN ZINN.

09:13AM 2 THE COURT: ALL RIGHT.

09:13AM 3 MR. ECCLES: YOUR HONOR, OUR POSITION IS THE SAME
09:13AM 4 AS IT WAS FOR THE LAST HEARING. THAT WAS THE LAGGING COUNTIES.
09:13AM 5 ALL THESE CORRECTIVE ACTION ORDERS HAVE BIZARRE NAMES. WE HAVE
09:13AM 6 UNDER THE FIRST PRONG SATISFIED EACH OF THE BULLET POINTS IN
09:13AM 7 THE CORRECTIVE ACTION ORDER, AND WE'RE READY TO BE RELIEVED OF
09:13AM 8 THAT CORRECTIVE ACTION ORDER AS WELL AS THE RELEVANT PARAGRAPHS
09:13AM 9 IN THE CONSENT DECREE.

09:13AM 10 THE COURT: OKAY. ALL RIGHT.

09:13AM 11 THE FIRST MOTION WAS FILED BY MS. SWANSON. SO,
09:13AM 12 MS. SWANSON, WHAT WOULD YOU LIKE TO SAY?

09:14AM 13 MR. ECCLES: AND I BELIEVE, JUDGE, THAT THE
09:14AM 14 PLAINTIFFS HAVE AS THEIR FIRST EXHIBIT THE ACTUAL CORRECTIVE
09:14AM 15 ACTION ORDER.

09:14AM 16 THE COURT: OKAY. I HAVE A COPY OF IT RIGHT HERE.

09:14AM 17 MR. ECCLES: VERY GOOD.

09:14AM 18 MS. SWANSON: I'M AFRAID I'M NOT VERY GOOD WITH YOUR
09:14AM 19 TECHNOLOGY YET, YOUR HONOR.

09:14AM 20 THE COURT: THAT'S ALL RIGHT. MS. SANFORD CAN HELP
09:14AM 21 YOU.

09:14AM 22 MS. SWANSON: THIS IS THE FIRST PAGE OF THE
09:14AM 23 CORRECTIVE ACTION ORDER THAT WE'RE DEALING WITH. IT DEALS
09:14AM 24 BASICALLY WITH TWO PROBLEMS, ONE OF WHICH WAS AROUND WHEN THE
09:14AM 25 DECREE WAS ENTERED IN 1996 AND ONE CAME LATER. IT DEALS WITH

09:14AM 1 THE AVAILABILITY OF MEDICINES, PRESCRIPTION AND NONPRESCRIPTION,
09:14AM 2 TO MEDICAID-COVERED CHILDREN. AND THEY ARE ELIGIBLE FOR
09:15AM 3 NONPRESCRIPTION MEDICATIONS IF THEY HAVE A DOCTOR'S REQUEST
09:15AM 4 THAT THE CHILD NEEDS IT. IT ALSO DEALS WITH THE AVAILABILITY
09:15AM 5 OF MEDICAL EQUIPMENT AND MEDICAL SUPPLIES TYPICALLY SOLD IN
09:15AM 6 PHARMACIES, SUCH AS NEBULIZERS, STERILE GAUZE, STERILE GLOVES
09:15AM 7 USED FOR CHILDREN AFTER SURGERY OR CHILDREN WITH CHRONIC
09:15AM 8 MEDICAL CONDITIONS. IF A PRESCRIPTION MEDICINE,
09:15AM 9 NONPRESCRIPTION MEDICINE OR ITEM OF MEDICAL SUPPLY IS MEDICALLY
09:15AM 10 NECESSARY FOR A CHILD, IT IS TO THE ADVANTAGE OF THE TAXPAYERS
09:15AM 11 AS WELL AS THE CHILD THAT THE CHILD BE ABLE TO GET THAT,
09:15AM 12 BECAUSE IT CAN HELP PREVENT SOME EVEN MORE COSTLY FORMS OF
09:15AM 13 MEDICAL CARE, SUCH AS HOSPITALIZATIONS.

09:15AM 14 IN 1996, THERE WERE ALREADY, AT THAT TIME, PROBLEMS
09:16AM 15 WITH PHARMACISTS' KNOWLEDGE OF MEDICAID LAW AND WHAT MEDICAID
09:16AM 16 COVERED AND DID NOT COVER. PLAINTIFFS CONTENDED AT THAT TIME
09:16AM 17 THAT PARENTS WOULD GO TO A PHARMACY TO TRY TO GET SOME SIMPLE
09:16AM 18 ITEM OF MEDICAL EQUIPMENT OR MEDICAL SUPPLY THAT THEIR CHILD
09:16AM 19 NEEDED AND THAT THEY HAD A PRESCRIPTION FOR, AND THEY WOULD BE
09:16AM 20 TOLD THAT MEDICAID DOESN'T COVER THAT. THEY WOULD NOT KNOW HOW
09:16AM 21 OR WHERE TO GET IT.

09:16AM 22 AND SO THERE WERE TWO DECREE PARAGRAPHS THAT DEALT
09:16AM 23 WITH THAT ISSUE. I WANT TO COME BACK TO THOSE PARAGRAPHS AFTER
09:16AM 24 WE TALK--AFTER I TELL YOU A LITTLE BIT ABOUT THE PROBLEMS WITH
09:16AM 25 THE AVAILABILITY OF PRESCRIPTION MEDICINES THAT OCCURRED LATER.

09:17AM 1 IN 2003 OR EARLY 2004, THE STATE OF TEXAS IMPLEMENTED
09:17AM 2 A PREFERRED-DRUG LIST FOR PEOPLE WITH MEDICAID, CHILDREN AND
09:17AM 3 OTHERS. AND THAT IS WHEN THERE BEGAN TO BE PROBLEMS WITH THE
09:17AM 4 AVAILABILITY OF PRESCRIPTION MEDICINES TO MEDICAID-COVERED
09:17AM 5 CHILDREN.

09:17AM 6 THE MEDICAID PREFERRED-DRUG LIST IS PERMITTED BY
09:17AM 7 FEDERAL LAW. IT SAVES MONEY. BUT IF IT DOES NOT WORK RIGHT,
09:17AM 8 IT PREVENTS CHILDREN--MEDICAID-COVERED CHILDREN FROM GETTING
09:17AM 9 THE MEDICINE THAT THEY NEED. AND THAT IS WHAT HAS HAPPENED IN
09:17AM 10 TEXAS.

09:17AM 11 THE COURT: IS IT A LIST OF DRUGS FOR WHICH THERE
09:17AM 12 ARE ALTERNATIVES BUT THE DRUGS ON THE LIST ARE LESS EXPENSIVE?

09:17AM 13 MS. SWANSON: IT IS A LIST OF DRUGS WHOSE
09:17AM 14 MANUFACTURERS PAY REBATES TO THE STATE IN RETURN FOR THE STATE
09:18AM 15 PREFERRING THOSE DRUGS. IT ALSO HAS ELEMENTS OF PREFERRING
09:18AM 16 DRUGS THAT ARE--PREFERRING DRUGS THAT WILL GENERALLY SAVE THE
09:18AM 17 STATE MONEY. AND WE CERTAINLY DON'T OBJECT TO THAT. WE'RE
09:18AM 18 ALL FOR SAVING THE STATE MONEY. BUT THE PREFERRED-DRUG LIST
09:18AM 19 IN TEXAS IS VERY COMPLEX. EVEN WITH THE HELP OF THE HANDHELD
09:18AM 20 SYSTEM THAT DEFENDANTS HAVE IMPLEMENTED, THERE ARE MANY
09:18AM 21 PROBLEMS WITH DOCTORS BEING ABLE TO BE SURE THAT THE MEDICATION
09:18AM 22 THEY'RE PRESCRIBING IS GOING TO BE A PRESCRIPTION THAT WILL BE
09:18AM 23 ABLE TO BE FILLED AT THE PHARMACY. ONE EXAMPLE OF THAT--

09:19AM 24 THE COURT: IS THE PREFERRED-DRUG LIST CONSISTENT
09:19AM 25 FROM STATE TO STATE? IN OTHER WORDS, HAS THE FEDERAL

09:19AM 1 GOVERNMENT APPROVED A PARTICULAR LIST OF DRUGS AS THE
09:19AM 2 PREFERRED-DRUG LIST OR CAN EACH STATE FASHION ITS OWN
09:19AM 3 PREFERRED-DRUG LIST?

09:19AM 4 MS. SWANSON: I'M NOT SURE HOW MUCH IT DIFFERS FROM
09:19AM 5 STATE TO STATE. THERE ARE SOME DIFFERENCES. AND I DON'T KNOW
09:19AM 6 HOW TEXAS WOULD COMPARE TO OTHER STATES. HERE'S AN EXAMPLE OF
09:19AM 7 WHAT PART OF THE PREFERRED-DRUG LIST LOOKS LIKE. THIS IS THE
09:19AM 8 DRUG ZYPREXA. IT IS THE FIRST PAGE OF WHAT THE PREFERRED-DRUG
09:19AM 9 LIST WOULD SHOW CONCERNING THAT DRUG IF A DOCTOR LOOKED AT
09:19AM 10 IT ONLINE. YOU'LL NOTE THAT, FOR EXAMPLE--THIS IS FROM
09:20AM 11 DEFENDANTS' EXHIBITS, BY THE WAY, THAT THEY FILED WITH THEIR
09:20AM 12 RESPONSE. YOU WOULD HAVE TO DIG THROUGH THIS AND THE NEXT PAGE
09:20AM 13 TO KNOW THINGS SUCH AS THE 5-MILLIGRAM TABLET REQUIRES PRIOR
09:20AM 14 AUTHORIZATION, THE 7-1/2-MILLIGRAM TABLET REQUIRES
09:20AM 15 AUTHORIZATION, THE 10-MILLIGRAM TABLET DOESN'T.

09:20AM 16 ON THE FIRST PAGE, WE HAVE THINGS LIKE THE
09:20AM 17 10-MILLIGRAM TABLET REQUIRES PRIOR AUTHORIZATION, THE
09:20AM 18 10-MILLIGRAM VIAL DOES NOT, ET CETERA. IT IS COMPLEX.

09:20AM 19 AND DEFENDANTS, I THINK, WOULD LIKE TO THINK THAT
09:20AM 20 THEIR--IT'S CALLED THE EPOCRATES SYSTEM, A SYSTEM THAT THEY
09:21AM 21 USE THAT CAN BE--THAT DOCTORS CAN DOWNLOAD TO TABLETS OR
09:21AM 22 SMARTPHONES THAT WILL TELL THEM SOME THINGS ABOUT THE
09:21AM 23 PREFERRED-DRUG LIST. BUT IT DOES NOT DIFFERENTIATE AMONG
09:21AM 24 DOSAGE FORMS AND IT DOES NOT, ACCORDING TO DEFENDANTS' OTHER
09:21AM 25 EXHIBITS, COVER ALL THE DRUGS. SO DOING THAT SYSTEM, THE

09:21AM 1 EPOCRATES SYSTEM, OR IMPLEMENTING THAT SYSTEM WAS ONE OF THE
09:21AM 2 THINGS THEY WERE REQUIRED TO DO UNDER THE CORRECTIVE ACTION
09:21AM 3 ORDER, AND THEY HAVE DONE IT, BUT IT IS NOWHERE NEAR AS HELPFUL
09:21AM 4 AS THEY WOULD LIKE TO TELL THE COURT THAT IT IS.

09:21AM 5 THE COURT: WAIT A MINUTE. THE EPOCRATES SYSTEM IS
09:21AM 6 A SYSTEM OF DOING WHAT, NOW?

09:21AM 7 MS. SWANSON: IT IS A SYSTEM THROUGH WHICH DOCTORS
09:21AM 8 CAN - -

09:21AM 9 THE COURT: ORDER OR PRESCRIBE DRUGS?

09:21AM 10 MS. SWANSON: NO. THEY CAN LOOK AT IT TO HELP THEM
09:21AM 11 DETERMINE WHAT DRUG IS ON THE MEDICAID PREFERRED-DRUG LIST AND
09:21AM 12 WHAT IS NOT.

09:21AM 13 THE COURT: OKAY.

09:22AM 14 MS. SWANSON: BUT IT IS NOT AS SIMPLE AS KNOWING
09:22AM 15 THAT, FOR EXAMPLE, YOU CAN PRESCRIBE ZYPREXA FOR A PATIENT.
09:22AM 16 YOU HAVE TO KNOW THAT--LOOK UP AND FIND OUT THAT THE
09:22AM 17 10-MILLIGRAM TABLET IS THIS WAY, BUT THE 10-MILLIGRAM VIAL
09:22AM 18 IS NOT, AND THE 15-MILLIGRAM TABLET, ET CETERA.

09:22AM 19 IN ADDITION, MEDICAID DIFFERS FROM THE FORMULARIES
09:22AM 20 OF MOST PRIVATE INSURANCE COMPANIES IN THAT MOST PRIVATE
09:22AM 21 INSURANCE COMPANIES PREFER DRUGS--OR GENERICS, BECAUSE THEY
09:22AM 22 ARE GENERALLY CHEAPER. SOMETIMES WITH THE MEDICAID PROGRAM
09:22AM 23 THE BRAND-NAME DRUG IS PREFERRED AND NOT THE GENERIC. THIS IS
09:22AM 24 CONFUSING TO DOCTORS. FOR DOCTORS WHO HAVE A LOT OF MEDICAID
09:22AM 25 PATIENTS, THEY MAY KNOW HOW TO LOOK UP THINGS ON EPOCRATES,

09:22AM 1 WHICH THEY WOULD HAVE TO DOWNLOAD OR LOOK AT THE WEB SITE OF
09:22AM 2 THE VENDOR DRUG PROGRAM AND GO THROUGH ALL OF--IT'S OVER 40
09:23AM 3 PAGES LONG--GO THROUGH ALL OF IT TO FIGURE OUT WHAT THEY CAN
09:23AM 4 PRESCRIBE THAT MAY GO THROUGH THE SYSTEM OR MAY NOT. THERE'S
09:23AM 5 TESTIMONY THAT EVEN IF THEY DO THAT, THE DRUG MAY NOT BE
09:23AM 6 APPROVED BY THE PHARMACY BENEFITS MANAGERS OF THE HMO'S. BUT
09:23AM 7 THAT'S WHERE A DOCTOR WOULD START. ONE WOULD START WITH EITHER
09:23AM 8 EPOCRATES OR THE WEB SITE FOR THE VENDOR DRUG PROGRAM, OR BOTH.

09:23AM 9 THE COURT: OKAY. IS IT YOUR POSITION THAT THERE'S
09:23AM 10 A PROBLEM WITH DOCTORS UNDERSTANDING THIS OR A PROBLEM WITH
09:23AM 11 PHARMACISTS UNDERSTANDING THIS?

09:23AM 12 MS. SWANSON: THERE'S A PROBLEM WITH BOTH, YOUR
09:23AM 13 HONOR. THERE'S A PROBLEM WITH DOCTORS BEING ABLE TO
09:23AM 14 EFFECTIVELY USE THE VENDOR DRUG PROGRAM PREFERRED-DRUG LIST.
09:23AM 15 THEY WRITE PRESCRIPTIONS, THEY CAN'T BE FILLED, THEY GET
09:23AM 16 REJECTED AT THE PHARMACY.

09:23AM 17 THE COURT: WELL, THE DOCTOR IS WRITING THE
09:24AM 18 PRESCRIPTION THAT HE OR SHE THINKS IS APPROPRIATE. RIGHT?

09:24AM 19 MS. SWANSON: YES, THAT HE OR SHE THINKS IS
09:24AM 20 APPROPRIATE.

09:24AM 21 THE COURT: SO WHAT SHOULD THE STATE DO TO EDUCATE
09:24AM 22 DOCTORS ON WHAT PRESCRIPTION IS APPROPRIATE? I DON'T THINK
09:24AM 23 THERE'S ANYTHING THE STATE CAN DO.

09:24AM 24 MS. SWANSON: WELL, I THINK IT IS THE STATE'S
09:24AM 25 RESPONSIBILITY TO SEE THAT THERE IS A SYSTEM THAT DOCTORS CAN

09:24AM 1 EFFECTIVELY USE. THEY PROBABLY ARE PART OF THE PROBLEM,
09:24AM 2 PHARMACISTS ARE PART OF THE PROBLEM, AND THE HMO PHARMACY
09:24AM 3 BENEFITS MANAGERS ARE PART OF THE PROBLEM.

09:24AM 4 THE COURT: ARE YOU SAYING THAT THE DOCTORS ARE PART
09:24AM 5 OF THE PROBLEM IN THAT THE LIST YOU JUST PUT ON THE SCREEN IS
09:24AM 6 INSUFFICIENT IN SOME WAY?

09:24AM 7 MS. SWANSON: IT IS COMPLEX, DIFFICULT FOR THEM
09:24AM 8 TO MASTER. IT CHANGES SEVERAL TIMES A YEAR. IT IS NOT A
09:24AM 9 REALISTIC SYSTEM THAT DOCTORS CAN USE.

09:24AM 10 I MISSPOKE IF I GAVE THE IMPRESSION DOCTORS
09:24AM 11 THEMSELVES ARE A PROBLEM. IT IS THE INTERACTION BETWEEN THE
09:25AM 12 DOCTORS AND THE COMPLEX LIST THAT IS ONE OF THE PROBLEMS, BUT
09:25AM 13 IT'S ONLY THE BEGINNING OF THE PROBLEM.

09:25AM 14 THE COURT: ARE YOU SAYING DOCTORS CAN'T UNDERSTAND,
09:25AM 15 WHEN THEY GO ON THE LIST, THAT A ZYPREXA 10-MILLIGRAM CAPSULE
09:25AM 16 REQUIRES NO EXCEPTION--WHAT'S THE TERM?

09:25AM 17 MS. SWANSON: PRIOR AUTHORIZATION.

09:25AM 18 THE COURT: --PRIOR AUTHORIZATION, BUT ZYPREXA'S
09:25AM 19 10-MILLIGRAM TABLET DOES? I MEAN, IT'S RIGHT THERE IN PRINT.

09:25AM 20 MS. SWANSON: I THINK THAT IS A DIFFICULT THING TO
09:25AM 21 EXPECT DOCTORS WHO SEE, PERHAPS, FEW MEDICAID PATIENTS TO KEEP
09:25AM 22 UP WITH, IT IS SO DIFFERENT FROM THE FORMULARIES OF PRIVATE
09:25AM 23 INSURANCE COMPANIES. NOW, THAT IS BY NO MEANS THE ONLY
09:25AM 24 PROBLEM. EVEN IF THE DOCTOR WRITES A PRESCRIPTION FOR A DRUG
09:25AM 25 THAT SHOULD BE COVERED, THERE'S TESTIMONY THAT SOMETIMES THE

09:26AM 1 HMO'S PHARMACY BENEFITS MANAGERS DO NOT PERMIT THAT PRESCRIPTION
09:26AM 2 TO GO THROUGH. SO THERE ARE A VARIETY OF PROBLEMS, THE
09:26AM 3 PREFERRED-DRUG LIST BEING ONLY ONE.

09:26AM 4 BUT, YES, IT IS THE STATE'S RESPONSIBILITY TO CREATE
09:26AM 5 A SYSTEM THAT IS WORKABLE. EVEN THEY WILL SAY AND HAVE SAID IN
09:26AM 6 THEIR PLEADINGS THAT THEY HAVE JUST GIVEN UP ON EMERGENCY-ROOM
09:26AM 7 DOCTORS. EMERGENCY-ROOM DOCTORS ARE NOT LIKELY TO BE LOOKING
09:26AM 8 UP 40-PAGE LISTS ON THE COMPUTER TO FIND OUT WHAT THEY CAN
09:26AM 9 PRESCRIBE FOR A CHILD THAT THEY MAY NOT EVEN KNOW HAS MEDICAID
09:26AM 10 AS OPPOSED TO SOME OTHER INSURANCE.

09:26AM 11 SO WHEN THE PARENTS OF THAT CHILD WHO HAS BEEN
09:26AM 12 IN THE EMERGENCY ROOM GET TO THE PHARMACY TO GET THEIR
09:26AM 13 PRESCRIPTION FILLED, THEY'RE QUITE LIKELY TO FIND THAT IT'S
09:26AM 14 A PRESCRIPTION THAT REQUIRES A PRIOR AUTHORIZATION. SOMEONE
09:26AM 15 CAN CALL THE DOCTOR AT THE EMERGENCY ROOM, WHO IS LIKELY TO
09:27AM 16 BE OFF DUTY BY THEN, IS NOT GOING TO COME TO THE PHONE. AND
09:27AM 17 DEFENDANTS, IN THEIR FILINGS, HAVE PRETTY MUCH SAID THE SAME
09:27AM 18 THING, ESPECIALLY FOR PRESCRIPTIONS WRITTEN BY EMERGENCY-ROOM
09:27AM 19 DOCTORS. THEY'RE LIKELY TO BE REJECTED. THESE DOCTORS DON'T
09:27AM 20 CALL FOR PRIOR AUTHORIZATION. AND SO...

09:27AM 21 THE COURT: WELL, AFTER THEY WRITE THE PRESCRIPTION,
09:27AM 22 CAN SOMEONE THEN GET AUTHORIZATION? CAN THE PHARMACY DO THAT?

09:27AM 23 MS. SWANSON: THE PHARMACIST CANNOT DO THAT, BUT THE
09:27AM 24 PROCEDURE IS SUPPOSED TO BE IF THE FAMILY GETS TO THE PHARMACY
09:27AM 25 WITH A PRESCRIPTION THAT REQUIRES PRIOR AUTHORIZATION, THE

09:27AM 1 PHARMACIST WILL RUN IT THROUGH THE COMPUTER SYSTEM, THE
09:27AM 2 MEDICAID COMPUTER SYSTEM, TO TRY TO GET IT PAID. AND IF IT
09:27AM 3 DOES NOT GO THROUGH, THE PHARMACIST WILL GET A MESSAGE THAT
09:28AM 4 SAYS, "CONTACT THE DOCTOR SO THAT THE DOCTOR CAN GIVE PRIOR
09:28AM 5 AUTHORIZATION. AND IF THE DOCTOR IS NOT AVAILABLE, YOU SHOULD
09:28AM 6 DISPENSE A 72-HOUR EMERGENCY SUPPLY OF MEDICATION." AND THAT
09:28AM 7 72-HOUR EMERGENCY SUPPLY IS A HUGE PART OF MAKING THE SYSTEM
09:28AM 8 WORK. BECAUSE THEORETICALLY, IF THE CHILD CAN GET A 72-HOUR
09:28AM 9 SUPPLY OF MEDICINE AND THE REST OF THE SYSTEM WORKS EVEN
09:28AM 10 HALFWAY WELL, BY THE TIME THAT 72-HOUR SUPPLY IS USED UP, THE
09:28AM 11 PRIOR AUTHORIZATION WILL BE--WILL HAVE BEEN OBTAINED OR THE
09:28AM 12 DOCTOR CAN CHANGE THE PRESCRIPTION. THE PHARMACIST, HOWEVER,
09:28AM 13 CAN'T DO IT. THE PHARMACIST CAN JUST CONTACT THE PRESCRIBER.
09:28AM 14 AND THE PRESCRIBER CAN THEN CHANGE THE PRESCRIPTION.

09:28AM 15 THE COURT: OKAY. SO THE DOCTOR HAS A MEDICAID
09:28AM 16 PATIENT. HE EXAMINES THE PATIENT, DECIDES WHAT TO PRESCRIBE,
09:29AM 17 GOES TO THE MEDICAID LIST, THE PREFERRED-DRUG LIST, AND SEES
09:29AM 18 THAT IT EITHER DOES NOT OR DOES REQUIRE PRIOR AUTHORIZATION.
09:29AM 19 IF IT DOES, IT'S RIGHT THERE ON HIS COMPUTER SCREEN AND IT'S
09:29AM 20 RIGHT IN FRONT OF HIM TO SHOW HIM HE NEEDS TO GET PRIOR
09:29AM 21 AUTHORIZATION. ARE YOU SAYING THAT THE DOCTORS DON'T LOOK
09:29AM 22 CAREFULLY AT THE LIST?

09:29AM 23 MS. SWANSON: UM, I'M SAYING THAT THAT'S ONE OF THE
09:29AM 24 THINGS THAT IS OCCURRING.

09:29AM 25 THE COURT: WELL, WHAT WOULD YOU SUGGEST THE STATE

09:29AM 1 DO IF THE DOCTORS ARE NOT READING THE LIST?

09:29AM 2 MS. SWANSON: WELL, DOCTORS HAVE A RESPONSIBILITY--

09:29AM 3 SINCE THEY ARE CONTRACTED WITH THE STATE, DIRECTLY OR

09:29AM 4 INDIRECTLY, THEY HAVE A RESPONSIBILITY TO DO WHAT THEY

09:29AM 5 REASONABLY CAN TO SEE THAT THEIR PATIENTS GET THEIR NEEDED

09:29AM 6 MEDICINE. IT'S OBVIOUSLY TO NO ONE'S ADVANTAGE IF THE CHILD

09:29AM 7 DOESN'T GET IT. IN FACT, ONE OF THE THINGS THAT OCCURRED THAT

09:29AM 8 CAUSED THIS CORRECTIVE ACTION ORDER TO BE ENTERED THAT FOCUSED

09:30AM 9 ON 72-HOUR MEDICINE SUPPLIES WAS THAT A FOSTER MOTHER TESTIFIED

09:30AM 10 IN 2005 THAT A VERY YOUNG CHILD THAT SHE HAD TO TAKE TO THE

09:30AM 11 EMERGENCY ROOM FOR A BREATHING PROBLEM, THE CHILD WAS TREATED

09:30AM 12 IN THE E.R. AND GIVEN A TAKE-HOME PRESCRIPTION. SHE TOOK THAT

09:30AM 13 TAKE-HOME PRESCRIPTION TO A PHARMACY. THE PHARMACY SAID,

09:30AM 14 "THIS REQUIRES PRIOR AUTHORIZATION AND WE CAN'T GET IT. IT'S

09:30AM 15 SUNDAY," I THINK IT WAS--IT MAY HAVE BEEN SATURDAY, BUT IT WAS

09:30AM 16 OVER THE WEEKEND--"SO WE CAN'T FILL THIS PRESCRIPTION." AND

09:30AM 17 NO ONE, APPARENTLY, KNEW ANYTHING ABOUT 72-HOUR SUPPLIES. SO

09:30AM 18 THE CHILD HAD TO BE REHOSPITALIZED BECAUSE OF THE INABILITY TO

09:30AM 19 OBTAIN THAT MEDICINE. IT'S A PROBLEM THAT HAS TO BE DEALT WITH

09:30AM 20 IF CHILDREN ARE GOING TO GET WHAT THEY'RE ENTITLED TO AND WHAT

09:30AM 21 THEY NEED.

09:30AM 22 MR. ECCLES: I HATE TO OBJECT DURING ARGUMENT, BUT

09:30AM 23 THIS IS A REFERENCE TO AN EXHIBIT IN 2005 AND AN ANECDOTE OF A

09:31AM 24 PATIENT IN 2005. I JUST WANT TO PUT THIS ALL IN CONTEXT THAT

09:31AM 25 WE CAN'T POSSIBLY BE TALKING ABOUT THE CORRECTIVE ACTION ORDER

09:31AM 1 HERE IN 2013.

09:31AM 2 THE COURT: I THINK IT GOES TO THE WEIGHT, MR. ECCLES.

09:31AM 3 MS. SWANSON: THE ORDER, STRUCTURED AS IT IS, IF

09:31AM 4 THAT CHILD IN 2005 HAD BEEN ABLE TO GET A 72-HOUR SUPPLY

09:31AM 5 OF MEDICINE, THE REHOSPITALIZATION PROBABLY WOULD NOT HAVE

09:31AM 6 HAPPENED.

09:31AM 7 THE COURT: WELL, THEN, THE PHARMACY SHOULD HAVE

09:31AM 8 READ THE INSTRUCTIONS. RIGHT?

09:31AM 9 MS. SWANSON: THEY CERTAINLY SHOULD HAVE. THEY

09:31AM 10 SHOULD HAVE READ THE INSTRUCTIONS AND THEY SHOULD HAVE FOLLOWED

09:31AM 11 THE INSTRUCTIONS. BUT THEY DIDN'T.

09:31AM 12 THE COURT: SO WHAT DO YOU WANT THE STATE TO DO? DO

09:31AM 13 YOU WANT THE STATE TO CUT OFF PHARMACIES THAT ON ONE OCCASION,

09:31AM 14 TWO OCCASIONS, THREE OCCASIONS DON'T FOLLOW THE RULES?

09:31AM 15 MS. SWANSON: WE WANT THE PHARMACIES TO DO WHAT THE

09:31AM 16 CORRECTION ORDER REQUIRED THEM TO DO AND ENFORCE THE MEDICAID

09:32AM 17 LAW AND THE STATE REQUIREMENTS.

09:32AM 18 THE COURT: BUT THE DEFENDANT HERE IS THE STATE, NOT

09:32AM 19 THE PHARMACIES. SO WHAT ARE YOU ASKING THE STATE TO DO TO GET

09:32AM 20 THE PHARMACIES TO READ WHAT'S RIGHT IN FRONT OF THEM,

09:32AM 21 APPARENTLY?

09:32AM 22 MS. SWANSON: WE AGREE IT IS RIGHT IN FRONT OF THEM.

09:32AM 23 ONE THING THAT THEY COULD DO IS WHAT THE CORRECTIVE ACTION

09:32AM 24 ORDER REQUIRED THEM TO DO, AND THAT IS THEY WERE TO DO TWO

09:32AM 25 ANALYSES TO IDENTIFY PHARMACIES THAT WERE NOT PROVIDING 72-HOUR

09:32AM 1 MEDICINE SUPPLIES AS FREQUENTLY AS ONE WOULD EXPECT THAT THEY
09:32AM 2 SHOULD. THERE WERE MANY WHO WERE PROVIDING NO 72-HOUR MEDICINE
09:32AM 3 SUPPLIES.

09:32AM 4 IN 2007, WHEN THE COURT APPROVED THE CORRECTIVE
09:32AM 5 ACTION ORDERS, THE COURT SAID, AMONG OTHER THINGS, "IF THESE
09:32AM 6 72-HOUR SUPPLIES ARE NOT PROVIDED WHEN APPROPRIATE, CHILDREN
09:33AM 7 ARE NOT GONNA GET THE MEDICINES THAT THEY NEED." SO THIS PART
09:33AM 8 OF THE CORRECTION ORDER WAS SUPPOSED TO BE ONE OF THE THINGS
09:33AM 9 TO DEAL WITH THAT. THEY WERE SUPPOSED TO IDENTIFY RECALCITRANT
09:33AM 10 PHARMACIES AND THEY WERE SUPPOSED TO PROVIDE INTENSIVE AND
09:33AM 11 TARGETED EDUCATION FOR THOSE PHARMACIES, WHICH ONE WOULD THINK
09:33AM 12 MIGHT FOCUS ON ENFORCEMENT ACTIONS IN ADDITION TO, "LOOK,
09:33AM 13 HERE'S THE LAW."

09:33AM 14 THEY ALREADY TELL THEM IN THE ELECTRONIC MESSAGE,
09:33AM 15 "LOOK, HERE'S THE LAW." AND THAT, OBVIOUSLY, IS NOT DOING TOO
09:33AM 16 MUCH. SO WE'RE NOT OUT TO GET PHARMACISTS, BUT CLEARLY WHAT IS
09:33AM 17 REQUIRED TO GO ON HERE, LEGALLY REQUIRED TO GO ON HERE, IS NOT,
09:33AM 18 IN FACT, GOING ON. AND THIS CORRECTIVE ACTION ORDER WAS A
09:33AM 19 RELATIVELY MILD APPROACH: INTENSIVE, TARGETED EDUCATION.
09:33AM 20 NONE OF THAT HAS HAPPENED.

09:34AM 21 THE DEFENDANTS HAVE, TO THEIR CREDIT, PUT THINGS
09:34AM 22 ON WEB SITES, THEY'VE DONE GOOD GENERALIZED EDUCATION FOR
09:34AM 23 PHARMACIES, BUT THOSE EDUCATIONAL EFFORTS THAT ARE MENTIONED
09:34AM 24 IN THE THIRD LINE OF THE FIRST BULLET POINT ON PAGE 4 OF THE
09:34AM 25 CORRECTIVE ACTION ORDER, THAT WAS SUPPOSED TO BE--THEY WERE

09:34AM 1 SUPPOSED TO DO THAT AND THEY WERE SUPPOSED TO FIGURE OUT WHO IS
09:34AM 2 NOT COMPLYING AND GIVE THEM INTENSIVE AND TARGETED EDUCATION.

09:34AM 3 WHAT THEY DID INSTEAD WAS THEY SENT ONE LETTER.

09:34AM 4 ONLY IF THE PHARMACY DID NOT SIGN FOR THE CERTIFIED LETTER
09:34AM 5 DID ANY OF THE PHARMACIES GET A PERSONAL VISIT.

09:34AM 6 THEY ALSO MADE A PHONE CALL TO THE CORPORATE OFFICES
09:34AM 7 OF THE CHAIN PHARMACIES. SOME OF THE PHARMACIES WHO WERE NOT
09:34AM 8 FOLLOWING THE LAW WERE CHAINS AND SOME WERE NOT. SO THEY MADE
09:34AM 9 A PHONE CALL AND TALKED WITH THE CORPORATE TRAINERS. THERE
09:35AM 10 IS NOTHING IN EVIDENCE THAT SHOWS THAT THEY FOLLOWED UP TO
09:35AM 11 DETERMINE EXACTLY WHAT HAPPENED AFTER THAT. THERE WAS NOT EVEN
09:35AM 12 A PERSONAL--NOT EVEN ONE PERSONAL VISIT OR ONE PHONE CALL TO
09:35AM 13 THE HUGE MAJORITY OF THESE PHARMACIES.

09:35AM 14 AND THE BOTTOM LINE IS THE LAST TIME THEY DID AN
09:35AM 15 ANALYSIS, THERE WERE STILL MORE THAN 2,000 PHARMACIES PROVIDING
09:35AM 16 NO 72-HOUR MEDICINE SUPPLIES DURING THE LAST THREE-MONTH PERIOD
09:35AM 17 THAT DEFENDANTS LOOKED AT. SO, CLEARLY WHAT'S BEEN DONE SO
09:35AM 18 FAR IS NOT WORKING AND CLEARLY DEFENDANTS HAVE NOT DONE WHAT'S
09:35AM 19 REQUIRED BY THAT PART OF THE CORRECTIVE ACTION ORDER.

09:36AM 20 THE COURT: OKAY. HANG ON JUST A SECOND. SO YOU
09:36AM 21 SAID THAT IN REFERENCE TO THE FIRST BULLET POINT ON PAGE 4 OF
09:36AM 22 THE CORRECTIVE ACTION ORDER, THAT THE STATE SENT LETTERS TO ALL
09:36AM 23 PHARMACIES, IS THAT CORRECT?

09:36AM 24 MS. SWANSON: THEY SENT ONE LETTER TO EACH PHARMACY.

09:36AM 25 THE COURT: YEAH. OKAY. ONE LETTER. AND THEY

09:36AM 1 CALLED THOSE PHARMACIES THAT THEY, WHAT, HAD REPORTS WEREN'T
09:36AM 2 DISPENSING THE 72-HOUR SUPPLY OF MEDICINE?

09:36AM 3 MS. SWANSON: UM, FOR THE CORPORATE CHAIN PHARMACIES
09:36AM 4 THAT THEY IDENTIFIED THROUGH THE ANALYSIS, THEY MADE A PHONE
09:36AM 5 CALL TO THEIR CORPORATE OFFICES, NOT TO INDIVIDUAL PHARMACIES,
09:36AM 6 BUT TO THE CORPORATE OFFICES OF CHAIN PHARMACIES. THERE'S NO
09:37AM 7 INDICATION THAT IT WAS MORE THAN ONE PHONE CALL.

09:37AM 8 THE COURT: OKAY.

09:37AM 9 MS. SWANSON: THAT IS, ONE PHONE CALL EACH TO THE
09:37AM 10 CORPORATE OFFICES.

09:37AM 11 THE COURT: OKAY.

09:37AM 12 WHAT ELSE THAT YOU KNOW OF DID THE STATE DO?

09:37AM 13 MS. SWANSON: CONCERNING THE INTENSIVE, TARGETED
09:37AM 14 EFFORTS?

09:37AM 15 THE COURT: UH-HUH.

09:37AM 16 MS. SWANSON: MY UNDERSTANDING IS THAT'S WHAT THEY
09:37AM 17 DID. OH, FOR THE PHARMACIES THAT DID NOT SIGN FOR THE
09:37AM 18 CERTIFIED LETTER, THEY MADE EITHER A PHONE CALL OR A VISIT THAT
09:37AM 19 WAS MAYBE 40 OR SO OUT OF THE 800-SOMETHING THAT WERE TARGETED.

09:37AM 20 THE COURT: AND YOU SAID THE LAST STUDY DONE SHOWED
09:37AM 21 THAT 2,000 PHARMACIES WERE NOT DISPENSING 72-HOUR SUPPLIES OR
09:37AM 22 DRUGS THAT REQUIRED PRIOR AUTHORIZATION?

09:37AM 23 MS. SWANSON: THAT IS CORRECT.

09:37AM 24 THE COURT: HOW MANY PHARMACIES IN THE STATE ARE
09:37AM 25 PARTICIPATING IN THE MEDICAID PROGRAM?

09:37AM 1 MS. SWANSON: UM, NOW THERE ARE A LITTLE OVER 4,000.
09:37AM 2 AT THE TIME OF THE SECOND STUDY, IN THE LAST QUARTER, THERE
09:38AM 3 WERE 4,020.

09:38AM 4 THE COURT: SO HALF WERE NOT DISPENSING THE 72-HOUR
09:38AM 5 SUPPLY?

09:38AM 6 MS. SWANSON: THAT IS CORRECT. AND THAT'S THE LAST
09:38AM 7 TIME THE STATE LOOKED AT THE ISSUE.

09:38AM 8 THE COURT: AND THAT WAS IN 2010 OR 2011?

09:38AM 9 MS. SWANSON: IT WAS 2011. THE LAST QUARTER THEY
09:38AM 10 LOOKED AT WAS JULY THROUGH SEPTEMBER OF 2011.

09:38AM 11 THE COURT: OKAY. AND SPEAKING OF THAT, LET ME ASK
09:38AM 12 YOU AND MR. ECCLES: THE WAY I READ THIS CORRECTIVE ACTION
09:38AM 13 ORDER, IF YOU GO TO PAGE 3, I THINK THAT'S WHERE WE START A
09:38AM 14 TIME LINE, THE SECOND BULLET POINT SAYS, "SIX MONTHS AFTER THE
09:38AM 15 ENTRY OF THE ORDER, THE DEFENDANTS WILL BEGIN AN ANALYSIS OF
09:38AM 16 THEIR CONTRACTED PHARMACIES' CLAIMS HISTORY FOR EMERGENCY
09:38AM 17 PRESCRIPTIONS." NOW, IS THAT DIFFERENT, THAT'S EMERGENCY
09:39AM 18 PRESCRIPTIONS? IS THAT WHAT WE'RE TALKING ABOUT HERE, IS
09:39AM 19 JUST EMERGENCY--

09:39AM 20 MS. SWANSON: THESE 72-HOUR SUPPLIES ARE REFERRED
09:39AM 21 TO AS EMERGENCY-MEDICINE SUPPLIES.

09:39AM 22 THE COURT: OKAY. ALL RIGHT. THEN "WITHIN 12
09:39AM 23 MONTHS THE DEFENDANTS WILL COMPLETE THEIR ANALYSIS." SO SIX
09:39AM 24 MONTHS AFTER THIS ORDER WOULD HAVE BEEN SIX MONTHS AFTER APRIL
09:39AM 25 OF 2007, WHICH IS WHEN THE ORDER WAS ENTERED. AND THAT'S WHAT

09:39AM 1 THE BULLET POINT SAYS, "AFTER ENTRY OF THIS ORDER." SO THAT
09:39AM 2 MEANS THE STATE WOULD HAD TO HAVE BEGUN THE FIRST STUDY IN
09:39AM 3 OCTOBER OF 2007. IT WOULD HAVE LASTED NO MORE THAN A YEAR,
09:39AM 4 TO OCTOBER OF 2008.

09:39AM 5 THEN LATER IN THAT SAME BULLET POINT IT TALKS ABOUT
09:39AM 6 "WITHIN TWO YEARS OF COMPLETION OF THE FIRST ANALYSIS, THE
09:39AM 7 STATE BEGINS A SECOND ANALYSIS." SO THE BEGINNING OF THE
09:39AM 8 SECOND ANALYSIS WOULD HAVE HAD TO HAVE OCCURRED NO LATER THAN
09:40AM 9 OCTOBER OF 2010 AND WOULD HAD TO HAVE BEEN FINISHED NO LATER
09:40AM 10 THAN OCTOBER OF 2011. DO YOU AGREE WITH THAT TIME LINE,
09:40AM 11 MS. SWANSON?

09:40AM 12 MS. SWANSON: YES, YOUR HONOR, I BELIEVE THAT'S
09:40AM 13 CORRECT. WE RECEIVED THE SECOND ANALYSIS AT THE END OF MAY
09:40AM 14 OF 2012. AND THE SECOND ANALYSIS COVERED THE PERIOD OCTOBER
09:40AM 15 OF 2010 THROUGH SEPTEMBER OF 2011.

09:40AM 16 THE COURT: OKAY.

09:40AM 17 MR. ECCLES, DO YOU AGREE WITH THAT TIME LINE?

09:40AM 18 MR. ECCLES: WE MEASURED THE START DATE FROM
09:40AM 19 SEPTEMBER, NOT APRIL.

09:40AM 20 THE COURT: SEPTEMBER OF WHAT?

09:40AM 21 MR. ECCLES: THAT'S WHEN THE CORRECTIVE ACTION ORDER
09:40AM 22 WAS ACTUALLY ENTERED, SEPTEMBER OF 2007.

09:40AM 23 THE COURT: WELL, I DON'T KNOW. I'M LOOKING AT THE
09:40AM 24 HEADER AT THE TOP. IT SAYS "FILED APRIL 27TH, 2007." THAT'S
09:41AM 25 WHEN IT WAS ENTERED ON THE DOCKET.

09:41AM 1 MR. ECCLES: THAT'S WHEN THE CORRECTIVE ACTION
09:41AM 2 ORDERS WERE FILED. BUT THEY WEREN'T ACTUALLY ENTERED BY THE
09:41AM 3 COURT UNTIL SEPTEMBER.

09:41AM 4 THE COURT: OKAY. AND I DON'T SEE A SIGNATURE ON
09:41AM 5 THIS. DID JUDGE JUSTICE ORALLY APPROVE THESE?

09:41AM 6 MS. SWANSON: HE APPROVED THEM ORALLY IN JULY OF
09:41AM 7 2007. AND THEN IN SEPTEMBER OF 2007, HE ISSUED A MEMORANDUM
09:41AM 8 OPINION APPROVING THEM.

09:41AM 9 THE COURT: OKAY.

09:41AM 10 MS. SWANSON: BUT HE DIDN'T--WELL, HE ISSUED A
09:41AM 11 MEMORANDUM OPINION APPROVING THEM.

09:41AM 12 THE COURT: OKAY.

09:41AM 13 MS. SWANSON: THAT IS DOCKET NUMBER 663.

09:41AM 14 THE COURT: OKAY. AND THAT WAS IN SEPTEMBER OF 2007?

09:41AM 15 MS. SWANSON: YES, YOUR HONOR.

09:42AM 16 MR. ECCLES: LOOKS LIKE SEPTEMBER 5TH.

09:42AM 17 THE COURT: OKAY. OKAY. I WAS BEGINNING IN APRIL
09:42AM 18 BECAUSE THAT'S WHEN THESE DOCUMENTS WERE FILED. SO I SEE WHAT
09:42AM 19 YOU ARE SAYING. IT'S REALLY FIVE MONTHS LATER. WELL, IN ANY
09:42AM 20 EVENT, BOTH STUDIES ARE FINISHED NOW?

09:42AM 21 MS. SWANSON: YES, YOUR HONOR, THEY ARE.

09:42AM 22 THE COURT: OKAY.

09:42AM 23 MS. SWANSON: AND WE DON'T BELIEVE THAT THE
09:42AM 24 DEFENDANTS DID PRECISELY WHAT THE CORRECTIVE ACTION ORDER
09:42AM 25 REQUIRED THEM TO DO WITH RESPECT TO THE ANALYSIS. BUT IN

09:42AM 1 VIEW OF WHAT THEY DID NEXT, IT PROBABLY WOULD NOT HAVE
09:42AM 2 MATTERED, SINCE NONE OF THE IDENTIFIED PHARMACIES GOT WHAT
09:42AM 3 WE BELIEVED TO BE ANYTHING CLOSE TO INTENSIVE AND TARGETED
09:43AM 4 EDUCATIONAL EFFORTS.

09:43AM 5 THE COURT: IS THAT BULLET POINT REALLY AT THE
09:43AM 6 HEART OF WHAT YOUR MOTION IS ABOUT?

09:43AM 7 MS. SWANSON: THE BULLET POINT CONCERNING...

09:43AM 8 THE COURT: INTENSIVE, TARGETED EDUCATIONAL EFFORTS.

09:43AM 9 MS. SWANSON: THAT IS CERTAINLY A MAJOR CONCERN OF
09:43AM 10 OURS, BECAUSE IT WAS VERY IMPORTANT TO GETTING THE SYSTEM TO
09:44AM 11 WORK EFFECTIVELY. AND WHEN THEY DID NOT DO IT, CLEARLY THE
09:44AM 12 SYSTEM IS STILL NOT WORKING EFFECTIVELY. AND WE THINK THAT
09:44AM 13 THAT IS A MAJOR REASON. AND THEY DO HAVE A RESPONSIBILITY
09:44AM 14 TO MAKE IT WORK EFFECTIVELY.

09:44AM 15 THE COURT: OKAY.

09:44AM 16 MS. SWANSON: THEY CLAIM THAT THESE PEOPLE--THE
09:44AM 17 HMO'S OR THEIR CONTRACTORS, THE PHARMACISTS OR THEIR CONTRACTORS
09:44AM 18 ARE SUBCONTRACTORS AND THEY CAN'T DO ANYTHING ABOUT THEIR
09:44AM 19 BEHAVIOR. BUT, IN FACT, PARAGRAPH 300 OF THE DECREE DEALS WITH
09:44AM 20 THAT. IT SAYS THAT--LET ME JUST GET IT REALLY QUICKLY.
09:45AM 21 PARAGRAPH 300 OF THE DECREE MAKES IT CLEAR THAT THEY CAN
09:45AM 22 CONTRACT WITH WHOEVER THEY DECIDE TO, BUT THEY ARE ULTIMATELY
09:45AM 23 RESPONSIBLE FOR THE ADMINISTRATION OF THE PROGRAM AND FOR
09:45AM 24 COMPLIANCE WITH THE LAW AND WITH THE DECREE.

09:45AM 25 THE COURT: OKAY.

09:45AM 1 MS. SWANSON: NOW, WE'RE NOT OUT TO GET PHARMACISTS
09:45AM 2 OR DOCTORS. WE KNOW THEIR PARTICIPATION IN THE MEDICAID
09:45AM 3 PROGRAM IS IMPORTANT TO THE CHILDREN THAT WE REPRESENT, BUT THE
09:45AM 4 STATE HAS A RESPONSIBILITY TO SEE THAT THE PROGRAM OPERATES IN
09:45AM 5 COMPLIANCE WITH THE LAW AND WITH THE DECREE, IN ADDITION TO
09:45AM 6 THEIR RESPONSIBILITY TO DO WHAT'S REQUIRED THROUGH THE
09:45AM 7 CORRECTIVE ACTION ORDER. THEY HAVE NOT DONE THAT.

09:46AM 8 THE COURT: OKAY. SO, ACCORDING TO YOU, HALF THE
09:46AM 9 PHARMACIES ARE NOT DISPENSING 72-HOUR SUPPLIES?

09:46AM 10 MS. SWANSON: ACCORDING TO THE DEFENDANTS, HALF OF
09:46AM 11 THEM AREN'T.

09:46AM 12 THE COURT: OKAY.

09:46AM 13 MS. SWANSON: STILL.

09:46AM 14 THE COURT: OKAY.

09:47AM 15 MS. SWANSON: MAY I CONTINUE, YOUR HONOR?

09:47AM 16 THE COURT: YEAH. GIVE ME JUST A MOMENT HERE.

09:47AM 17 MS. SWANSON: YES, YOUR HONOR.

09:47AM 18 THE COURT: OKAY. SO WHAT CORRECTIVE ACTION ORDER
09:48AM 19 637-8 REQUIRES--AND I'LL COME TO THE DECREE IN A MOMENT, BUT IT
09:48AM 20 TALKS ABOUT THE 72-HOUR EMERGENCY ALLOTMENT OF MEDICATION NOT
09:48AM 21 LISTED ON THE PDL, IT TALKS ABOUT THE AUTOMATED SYSTEM, IT
09:48AM 22 REQUIRES THE STATE TO WORK WITH THE TEXAS PHARMACY ASSOCIATION
09:48AM 23 TO EXPLAIN TO ITS MEMBERS THE 72-HOUR EMERGENCY-PRESCRIPTION
09:49AM 24 POLICY, AND THEN TO CONDUCT THESE ANALYSES, ANALYSES OF ALL
09:49AM 25 PHARMACIES ENROLLED IN MEDICAID, AND THEY WERE SUPPOSED TO LOOK

09:49AM 1 AT PHARMACIES THAT WERE PROCESSING MEDICAID PRESCRIPTIONS BUT
09:49AM 2 HAVE PROCESSED NO EMERGENCY PRESCRIPTIONS UNDER THE 72-HOUR
09:49AM 3 POLICY.

09:50AM 4 MS. SWANSON: YES. I THINK THE FIRST STUDY WAS
09:50AM 5 SUPPOSED TO BE--OR THE FIRST LOOK WAS SUPPOSED TO BE AT
09:50AM 6 PHARMACIES THAT ARE PROCESSING A SIGNIFICANT VOLUME OF MEDICAID
09:50AM 7 PRESCRIPTIONS.

09:50AM 8 THE COURT: YEAH.

09:50AM 9 MS. SWANSON: BUT WITH NO EMERGENCY PRESCRIPTIONS.

09:50AM 10 THE COURT: YEAH. AND THEN WITH THOSE THAT HAVE
09:50AM 11 A LOWER-THAN-EXPECTED PERCENTAGE OF 72-HOUR PRESCRIPTIONS.

09:50AM 12 MS. SWANSON: RIGHT. THAT'S NOT QUITE WHAT THEY
09:50AM 13 DID, BUT, LIKE I SAY, I DON'T BELIEVE IT WOULD HAVE MATTERED.

09:50AM 14 THE COURT: AND THEN TWO YEARS AFTER THAT, A SECOND
09:50AM 15 ANALYSIS--OF THE SAME THING, I GUESS.

09:50AM 16 MS. SWANSON: YES.

09:50AM 17 THE COURT: ALL RIGHT. AND THEN THE CORRECTIVE
09:50AM 18 ACTION ORDER ALSO REQUIRES THESE INTENSIVE, TARGETED
09:50AM 19 EDUCATIONAL EFFORTS. AND THEN THE STATE HAS TO MAKE AVAILABLE
09:50AM 20 A MEDICAID PDL PRESCRIPTION SERVICE. DO YOU AGREE THEY'VE DONE
09:51AM 21 THAT?

09:51AM 22 MS. SWANSON: THEY HAVE DONE THAT. IT IS NOT QUITE
09:51AM 23 AS EASY TO USE OR AS INFALLIBLE AS THEY WOULD LIKE TO TELL US,
09:51AM 24 BUT, YES, THEY HAVE DONE THAT.

09:51AM 25 THE COURT: OKAY. SO, LET'S SEE, GOING BACK TO

09:51AM 1 PAGE 2 OF THE CAO, THE FIRST BULLET POINT--AND HERE'S WHAT
09:51AM 2 I'M LOOKING AT--"A PHARMACY MUST PROVIDE"--WELL, IT JUST SAYS
09:51AM 3 "THE DEFENDANTS' POLICY IS A PHARMACY MUST PROVIDE A 72-HOUR
09:51AM 4 EMERGENCY ALLOTMENT OF MEDICATION." SO I DON'T KNOW. I'LL
09:52AM 5 HEAR FROM MR. ECCLES. I ASSUME THAT'S THE STATE'S POLICY.
09:52AM 6 IT HAS TO BE, BECAUSE THAT'S IN THE ORDER.

09:52AM 7 MR. ECCLES: YES, IT'S IN THE RECITATION OF STATE
09:52AM 8 POLICY.

09:52AM 9 THE COURT: OKAY. ALL RIGHT.

09:52AM 10 THE SECOND BULLET POINT IS, "DEFENDANTS HAVE TO
09:52AM 11 HAVE AN AUTOMATED SYSTEM AVAILABLE 24 HOURS A DAY, SEVEN
09:52AM 12 DAYS A WEEK, FOR MEDICAID PHARMACY PROVIDERS." DO YOU
09:52AM 13 AGREE, MS. SWANSON, THAT THE STATE HAS AN AUTOMATED SYSTEM?

09:52AM 14 MS. SWANSON: THEY DO HAVE AN AUTOMATED SYSTEM THAT
09:52AM 15 PHARMACISTS CAN USE TO PUT THE PRESCRIPTION CLAIM THROUGH AND
09:53AM 16 IT WILL BE ACCEPTED OR REJECTED USUALLY IMMEDIATELY. I DO
09:53AM 17 NEED TO GO BACK A COUPLE OF STEPS AND TELL YOU ABOUT THE MAJOR
09:53AM 18 CHANGE THAT OCCURRED WITH PRESCRIPTION BENEFITS IN MARCH OF
09:53AM 19 2012, AND THAT IS THAT THE STATE MOVED MEDICAID PRESCRIPTION
09:53AM 20 BENEFITS INTO THE HANDS OF THE HMO'S, THE MEDICAID HMO'S, SO
09:53AM 21 NOW WHEN THE PHARMACIST PUTS THROUGH A PRESCRIPTION CLAIM, IT
09:53AM 22 WILL GO TO THE PHARMACY BENEFITS MANAGER OF THE HMO RATHER THAN
09:53AM 23 THE STATE ITSELF. BUT THESE, OF COURSE, ARE STATE CONTRACTORS.

09:53AM 24 THE COURT: OKAY. ALL RIGHT.

09:53AM 25 THEN THE THIRD BULLET POINT ON PAGE 2 OF THE CAO

09:53AM 1 I THINK IS JUST A DISCUSSION OF HOW IT'S SUPPOSED TO WORK.

09:53AM 2 MS. SWANSON: YES. I BELIEVE IT DESCRIBES THE
09:54AM 3 ADDITION TO THE MESSAGE. AT THE TIME THE CAO WAS ENTERED IN
09:54AM 4 SEPTEMBER OF 2007, I DON'T BELIEVE PHARMACISTS AT THAT TIME
09:54AM 5 WERE GETTING A MESSAGE BACK WHEN A PRESCRIPTION WAS REJECTED,
09:54AM 6 SAYING, YOU KNOW, "TELL THE DOCTOR TO CALL THIS NUMBER OR
09:54AM 7 PROVIDE A 72-HOUR SUPPLY IF THE PRESCRIBER CAN'T BE REACHED."

09:54AM 8 THE COURT: OKAY.

09:54AM 9 AND THEN THE FIRST BULLET POINT ON PAGE 3 REQUIRES
09:54AM 10 THE STATE TO WORK WITH THE TEXAS PHARMACY ASSOCIATION TO
09:54AM 11 EXPLAIN TO TPA MEMBERS. OKAY. HAVE THEY DONE THAT?

09:54AM 12 MS. SWANSON: I THINK THEY HAVE WORKED WITH THE
09:54AM 13 TEXAS PHARMACY ASSOCIATION. THINGS ARE STILL VERY DEFICIENT
09:54AM 14 AND NOT WORKING, BUT THEY'VE DONE THAT. THEY'VE CONTACTED
09:54AM 15 TEXAS PHARMACY ASSOCIATION.

09:54AM 16 THE COURT: OKAY.

09:54AM 17 THE NEXT BULLET POINT IS TO CONDUCT THE TWO STUDIES.
09:54AM 18 HAVE THEY DONE THAT?

09:54AM 19 MS. SWANSON: THEY HAVE CONDUCTED TWO STUDIES FAIRLY
09:55AM 20 CLOSE TO WHAT THE CORRECTIVE ACTION ORDER REQUIRED. NOT
09:55AM 21 COMPLIANT WITH IT, BUT FAIRLY CLOSE.

09:55AM 22 THE COURT: OKAY.

09:55AM 23 GOING TO PAGE 4, FIRST BULLET POINT, "DEFENDANTS
09:55AM 24 WILL PROVIDE INTENSIVE, TARGETED"--OKAY. THERE'S WHERE YOU
09:55AM 25 CONTEND THEY HAVE NOT DONE THAT?

09:55AM 1 MS. SWANSON: THEY HAVE NOT DONE THAT.

09:55AM 2 THE COURT: OKAY.

09:55AM 3 THE SECOND BULLET POINT, YOU AGREE, HAS BEEN DONE.

09:55AM 4 THE THIRD BULLET POINT--

09:55AM 5 MS. SWANSON: THAT ONE HAS BEEN DONE. I DON'T WANT
09:55AM 6 TO CONVEY THE IMPRESSION THAT IT HAS SOLVED THE PROBLEMS OR
09:55AM 7 THAT IT'S INFALLIBLE, BECAUSE THERE IS QUITE A BIT OF EVIDENCE
09:55AM 8 AND TESTIMONY THAT IT IS NOT. BUT, YES, THEY HAVE PROVIDED THE
09:55AM 9 PRESCRIPTION SERVICE.

09:55AM 10 THE COURT: OKAY.

09:55AM 11 THE THIRD BULLET POINT, HAS THE STATE ENCOURAGED
09:55AM 12 MEDICAID-ENROLLED PHARMACIES TO PROVIDE DURABLE MEDICAL
09:55AM 13 EQUIPMENT?

09:55AM 14 MS. SWANSON: THEY HAVE DONE SOME OF THAT. THEY
09:55AM 15 HAVE NOT BEEN TERRIBLY EFFECTIVE. IT USED TO BE 7 PERCENT WERE
09:55AM 16 ENROLLED AND NOW IT'S 37 OR 38 PERCENT. BUT THEY HAVE DONE
09:56AM 17 SOME OF THAT. THERE'S ALSO A NEW WRINKLE THERE BECAUSE--
09:56AM 18 WELL, NOT A NEW WRINKLE, BUT AN ADDITIONAL WRINKLE BECAUSE
09:56AM 19 PHARMACIES, IN ORDER TO PROVIDE MEDICAL EQUIPMENT AND SUPPLIES,
09:56AM 20 HAVE TO BE CONTRACTED NOT ONLY WITH THE MEDICAID PROGRAM AS
09:56AM 21 DURABLE MEDICAL-EQUIPMENT PROVIDERS, THEY HAVE TO BE CONTRACTED
09:56AM 22 AFTER THAT WITH INDIVIDUAL HMO'S. SO THE DIFFICULTIES ARE
09:56AM 23 STILL THERE, BUT, YES, I BELIEVE THEY HAVE ENCOURAGED
09:56AM 24 PHARMACIES--PRESCRIPTION PHARMACIES TO ALSO ENROLL AS
09:56AM 25 M.E. PROVIDERS.

09:56AM 1 THE COURT: OKAY.

09:56AM 2 THE FOURTH BULLET POINT, "BEGINNING IN SEPTEMBER OF
09:56AM 3 2007, EACH TIME A PHARMACY SIGNS A NEW CONTRACT, DEFENDANTS
09:56AM 4 WILL PROVIDE INFORMATION ABOUT THE EMERGENCY-PRESCRIPTION
09:56AM 5 POLICIES AND ALSO ABOUT DURABLE MEDICAL EQUIPMENT." HAS
09:56AM 6 THE STATE DONE THAT, IN YOUR OPINION?

09:56AM 7 MS. SWANSON: WE BELIEVE THEY HAVE PROVIDED
09:57AM 8 INFORMATION TO THE PHARMACIES ALONG THOSE LINES. PHARMACISTS
09:57AM 9 STILL DO NOT UNDERSTAND WHAT MEDICAID--WHAT PHARMACY-CARRIED
09:57AM 10 ITEMS MEDICAID COVERS, BUT I'M CONFIDENT--

09:57AM 11 THE COURT: BUT IT'S NOT BECAUSE THEY DON'T HAVE
09:57AM 12 THE INFORMATION, THEY'RE JUST NOT STUDYING IT OR ABSORBING IT?

09:57AM 13 MS. SWANSON: IT IS NOT HAPPENING. BUT WE DON'T
09:57AM 14 DISPUTE THAT WHEN A CONTRACT IS RENEWED THOSE PHARMACIES WOULD
09:57AM 15 GET A LETTER SAYING, "HI. HERE'S THE 72-HOUR REGULATION AND
09:57AM 16 HERE'S WHAT MEDICAID COVERS IN PHARMACIES."

09:57AM 17 NOW, THEY'RE NOT IN COMPLIANCE WITH THE RELATED
09:57AM 18 PARTS OF THE DECREE, BUT IN TERMS OF GOING THROUGH THE
09:57AM 19 CORRECTIVE ACTION ORDER HERE, YES, WE BELIEVE THEY'VE DONE
09:57AM 20 WHAT THIS BULLET POINT OF THIS CAO REQUIRES IN THAT WE
09:57AM 21 BELIEVE THEY HAVE PROVIDED INFORMATION.

09:57AM 22 THE COURT: OKAY.

09:57AM 23 I'M NOW GOING TO PAGE 5, THE FIRST BULLET POINT.
09:58AM 24 "DEFENDANTS WILL TRAIN STAFF AT THEIR OMBUDSMAN'S OFFICE."
09:58AM 25 HAVE THEY DONE THAT?

09:58AM 1 MS. SWANSON: THEY HAVE NOT TRAINED THEM AS THE
09:58AM 2 CORRECTIVE ACTION ORDER REQUIRES, BECAUSE IT REQUIRES THEM TO
09:58AM 3 TRAIN THE STAFF ABOUT WHAT STEPS TO TAKE TO IMMEDIATELY ADDRESS
09:58AM 4 CLASS MEMBERS' PROBLEMS WHEN PHARMACIES DON'T PROVIDE EMERGENCY
09:58AM 5 MEDICINES, AS WELL AS DURABLE MEDICAL-EQUIPMENT STANDARDS AND
09:58AM 6 COMMON PROBLEMS. INSTEAD, THEY HAVE TRAINED THEM THAT THEY
09:58AM 7 DON'T REALLY HAVE TO DO THAT AND THAT AT LEAST AT CERTAIN TIMES
09:58AM 8 AND IN CERTAIN SITUATIONS IT'S OKAY TO SEND THOSE FAMILIES TO
09:58AM 9 THE HMO'S, WHERE IT'S LIKE SENDING THEM OFF INTO THE BLACK
09:58AM 10 HOLE. WE KNOW VERY LITTLE ABOUT WHAT HAPPENS AFTER THAT.

09:58AM 11 BUT WE DID GET ONE HMO CALL LOG IN DISCOVERY THAT
09:58AM 12 INDICATES SOME APPROPRIATE RESPONSES TO FAMILIES' CALLS,
09:58AM 13 AND SOME VERY INAPPROPRIATE ONES. BUT CLEARLY WHAT THE CAO
09:59AM 14 REQUIRES HAS NOT BEEN DONE BECAUSE THEY WERE TO BE TRAINED TO
09:59AM 15 IMMEDIATELY ADDRESS THE PROBLEMS. AND THAT IS FREQUENTLY NOT
09:59AM 16 HAPPENING.

09:59AM 17 THE COURT: OKAY. SO YOU CONTEND THAT BULLET POINT
09:59AM 18 HAS NOT BEEN MET?

09:59AM 19 MS. SWANSON: YES.

09:59AM 20 THE COURT: THE SECOND BULLET POINT ON PAGE 5,
09:59AM 21 "DEFENDANTS WILL ENCOURAGE STAR MANAGED-CARE ORGANIZATIONS
09:59AM 22 TO TRAIN STAFF." FIRST OF ALL, I LOOKED THROUGH THIS ORDER.
09:59AM 23 I SEE NO DEFINITION OF THE ACRONYM "STAR." DID I MISS THAT?

09:59AM 24 MS. SWANSON: UM, LET'S SEE. STATE OF TEXAS ACCESS
09:59AM 25 REFORM. IT'S THE ACRONYM THAT'S USED FOR A FORM OF MEDICAID-

09:59AM 1 MANAGED CARE IN TEXAS. IT BASICALLY MEANS--

09:59AM 2 THE COURT: IS IT IN THE ORDER? I DIDN'T SEE IT IN
09:59AM 3 THE ORDER.

09:59AM 4 MS. SWANSON: IN THE ORDER, IN THE CORRECTIVE ACTION
09:59AM 5 ORDER?

09:59AM 6 THE COURT: YES.

10:00AM 7 MS. SWANSON: IT PROBABLY IS NOT, YOUR HONOR.

10:00AM 8 THE COURT: OKAY. WHAT DOES IT MEAN?

10:00AM 9 MS. SWANSON: IT MEANS THAT--THE STAR PROGRAM IS
10:00AM 10 A MANAGED-CARE PROGRAM FOR GENERALLY NONDISABLED MEDICAID
10:00AM 11 RECIPIENTS' CHILDREN AND THEIR PARENTS, WHO ARE NOT IN FOSTER
10:00AM 12 CARE. THAT'S A DIFFERENT PROGRAM. AND THE PROGRAM FOR
10:00AM 13 DISABLED MEDICAID RECIPIENTS IS ALSO A DIFFERENT PROGRAM.
10:00AM 14 SO IT'S SIMPLY A BRANCH OF THE TEXAS MEDICAID MANAGED-CARE
10:00AM 15 PROGRAM.

10:00AM 16 THE COURT: MR. ECCLES, WHAT DOES STAR STAND FOR?

10:00AM 17 MR. ECCLES: STATE OF TEXAS ACCESS REFORM. IT
10:00AM 18 PROVIDES PREVENTIVE PRIMARY AND ACUTE CARE-COVERED SERVICES TO
10:00AM 19 NONDISABLED CHILDREN, LOW-INCOME FAMILIES AND PREGNANT WOMEN.

10:00AM 20 THE COURT: STATE OF TEXAS ACCESS REFORM?

10:01AM 21 MR. ECCLES: YES, YOUR HONOR.

10:01AM 22 MS. SWANSON: YOUR HONOR, I'M AFRAID WE'VE BEEN
10:01AM 23 THROWING AROUND THESE ACRONYMS FOR SO MANY YEARS THAT WE DON'T
10:01AM 24 KEEP IN MIND THAT WE LIVE IN AN ARCANE WORLD AS LAWYERS ON THE
10:01AM 25 CASE.

10:01AM 1 THE COURT: THAT'S FINE.

10:01AM 2 SO THE SECOND BULLET POINT ON PAGE 5, "DEFENDANTS
10:01AM 3 WILL ENCOURAGE STAR MANAGED-CARE ORGANIZATIONS TO TRAIN STAFF
10:01AM 4 ABOUT EMERGENCY-PRESCRIPTION STANDARDS, WHAT STEPS TO TAKE,
10:01AM 5 AND DME STANDARDS." HAS THAT BEEN DONE?

10:01AM 6 MS. SWANSON: WE BELIEVE THE DEFENDANTS HAVE
10:01AM 7 ENCOURAGED THE MANAGED-CARE ORGANIZATIONS, THE HMO'S, TO TRAIN
10:01AM 8 THEIR STAFF. WHAT EFFECT THAT HAS HAD IS ANOTHER MATTER, BUT
10:02AM 9 WE BELIEVE THEY'VE BEEN ENCOURAGED TO DO THAT.

10:02AM 10 THE COURT: ALL RIGHT.

10:02AM 11 AND THE LAST BULLET POINT IS WHEN THE TWO ANALYSES
10:02AM 12 ARE COMPLETE, COUNSEL WILL CONFER TO DETERMINE WHAT, IF ANY,
10:02AM 13 FURTHER ACTION--OKAY. ALL RIGHT.

10:02AM 14 SO WHAT I SHOULD FOCUS ON, THEN, IS THE FIRST BULLET
10:02AM 15 POINT ON PAGE 4 AND THE FIRST BULLET POINT ON PAGE 5. NOW,
10:02AM 16 THAT'S IN THE CORRECTIVE ACTION ORDER.

10:03AM 17 MS. SWANSON: THAT'S CORRECT.

10:03AM 18 THE COURT: IN THE DECREE--I THINK YOUR BRIEFING
10:03AM 19 CONCENTRATED ON PARAGRAPHS 124 THROUGH 130.

10:03AM 20 MS. SWANSON: THAT CONCERNS PHARMACIST EDUCATION.
10:03AM 21 AND, YES, THAT IS ONE PART OF THE DECREE THAT IS RELEVANT.
10:03AM 22 HOWEVER, PARAGRAPHS 3 AND 190 OF THE DECREE ARE ALSO AT
10:03AM 23 THE HEART OF WHAT WE'RE TRYING TO ENFORCE HERE.

10:03AM 24 THE COURT: OKAY. 3 AND 190. OKAY.

10:03AM 25 MS. SWANSON: AND PARAGRAPH 3 IS UP ON THE SCREEN

10:03AM 1 NOW.

10:03AM 2 THE COURT: OKAY. YES. AND THAT SAYS, "RECIPIENTS
10:03AM 3 ARE ALSO ENTITLED TO ALL NEEDED FOLLOW-UP HEALTHCARE SERVICES
10:03AM 4 THAT ARE PERMITTED BY FEDERAL MEDICAID LAW." WHAT ARE YOU
10:03AM 5 TALKING ABOUT THERE? PRESCRIPTION DRUGS?

10:03AM 6 MS. SWANSON: WE'RE TALKING ABOUT PRESCRIPTION DRUGS
10:03AM 7 AND ALSO NEEDED MEDICAL EQUIPMENT AND MEDICAL SUPPLIES.

10:03AM 8 THE COURT: OKAY.

10:04AM 9 MS. SWANSON: AND PARAGRAPH 190 OF THE DECREE--
10:04AM 10 PARAGRAPH 3, BY THE WAY, IS ON THE FIRST PAGE, LISTED ON THE
10:04AM 11 FIRST PAGE OF THE CORRECTIVE ACTION ORDER.

10:04AM 12 THE COURT: YES.

10:04AM 13 MS. SWANSON: IT IS DIRECTLY TIED TO IT.

10:04AM 14 PARAGRAPH 190 IS NOT, BECAUSE AT THE TIME THE
10:04AM 15 CORRECTIVE ACTION ORDER WAS ENTERED, THE STATE ITSELF WAS STILL
10:04AM 16 HANDLING PRESCRIPTIONS THROUGH ITS VENDOR DRUG PROGRAM. ONLY
10:04AM 17 IN MARCH OF 2012 DID THE STATE GIVE THE HMO'S THE PRESCRIPTION
10:04AM 18 PROGRAM.

10:04AM 19 PARAGRAPH 190 SAYS THAT--BASICALLY THE SAME THING
10:04AM 20 AS PARAGRAPH 3 WITH RESPECT TO MANAGED CARE; THAT IS, MEDICAID-
10:04AM 21 COVERED CHILDREN ARE ENTITLED TO TIMELY RECEIPT OF THE FULL
10:04AM 22 RANGE OF EPSDT SERVICES, WHICH WOULD INCLUDE PRESCRIPTION
10:05AM 23 DRUGS, MEDICAL EQUIPMENT AND MEDICAL SUPPLIES. AND, YOUR
10:05AM 24 HONOR, AS WE POINT OUT IN OUR MOTION AND FOLLOW-UP PLEADINGS,
10:05AM 25 THE SYSTEM HAS HAD A MAJOR AMOUNT OF TURMOIL INTRODUCED INTO

10:05AM 1 IT JUST A YEAR AND A HALF AGO THROUGH THE TRANSITION TO MANAGED
10:05AM 2 CARE. DEFENDANTS REFER TO SUCH THINGS AS "MAJOR CHALLENGES,"
10:05AM 3 "MASSIVE UNDERTAKING." THEY AREN'T SURPRISED THAT THERE HAVE
10:05AM 4 BEEN COMPLAINTS. THE SYSTEM, AFTER BEING CHAOTIC THE FIRST
10:05AM 5 COUPLE OF MONTHS, HAS CALMED DOWN SOMEWHAT, BUT I DON'T KNOW
10:05AM 6 HOW DEFENDANTS CAN EVEN THINK IN TERMS OF A DURABLE REMEDY WHEN
10:05AM 7 WE HAD THIS MASSIVE UNDERTAKING AND MASSIVE CHANGE WITH A LOT
10:06AM 8 OF COMPLICATIONS IN MARCH OF 2012.

10:06AM 9 THE COURT: WHAT WAS THE CHANGE?

10:06AM 10 MS. SWANSON: THE CHANGE WAS THAT INSTEAD OF
10:06AM 11 HANDLING PRESCRIPTIONS THROUGH ITS OWN VENDOR DRUG PROGRAM,
10:06AM 12 THEY CONTRACTED WITH THE HMO'S TO PROCESS PRESCRIPTIONS, PAY
10:06AM 13 FOR PRESCRIPTIONS. THE HMO'S HAVE PHARMACY BENEFITS MANAGERS
10:06AM 14 WHO DEAL WITH THAT. BUT IT INTRODUCED--INSTEAD OF ONE ENTITY
10:06AM 15 THAT YOU GO TO FOR PRESCRIPTIONS OR PRESCRIPTION ISSUES, THERE
10:06AM 16 ARE NOW ABOUT 20 HMO'S. SOME OF THEM USE THE SAME PHARMACY
10:06AM 17 BENEFITS MANAGERS, BUT THERE ARE AT LEAST FIVE OR SIX, IF NOT
10:06AM 18 MORE. AND THAT, TOO, CAN BE CONFUSING BOTH FOR DOCTORS AND FOR
10:07AM 19 PHARMACISTS.

10:07AM 20 THIS IS THE DEFENDANTS' CHART OF ALL THE
10:07AM 21 ORGANIZATIONS THAT ARE NOW INVOLVED IN PRESCRIPTION MEDS FOR
10:07AM 22 CLASS MEMBERS.

10:07AM 23 IT HAS ALSO INTRODUCED WHAT THE TESTIMONY SHOWS--
10:07AM 24 TESTIMONY OF DOCTORS TREATING MEDICAID PATIENTS SHOWS TO BE
10:07AM 25 SOME PROBLEMS WITH THESE PHARMACY BENEFITS MANAGERS USING THIS

10:07AM 1 SAME PREFERRED-DRUG LIST OR USING THE PREFERRED-DRUG LIST THAT
10:07AM 2 THEY MUST USE ACCURATELY AND EFFECTIVELY. THERE'S SOME
10:07AM 3 TESTIMONY THAT, IN FACT, THEY DO NOT. THAT IS, TESTIMONY
10:07AM 4 OF DOCTORS.

10:07AM 5 THE COURT: IS THIS THE FULL LIST OF THE HMO'S THE
10:07AM 6 STATE HAS CONTRACTED WITH?

10:07AM 7 MS. SWANSON: IT'S A FULL LIST OF THE STAR HMO'S,
10:08AM 8 THE HMO'S FOR NONDISABLED AND NONFOSTER CARE MEDICAID
10:08AM 9 RECIPIENTS.

10:08AM 10 THE COURT: OKAY. AND THERE'S 19 OF THEM,
10:08AM 11 APPROXIMATELY?

10:08AM 12 MS. SWANSON: YES, THAT'S APPROXIMATELY CORRECT.
10:08AM 13 AND THEN IN THE CHART THERE ARE PHONE NUMBERS--PHARMACY
10:08AM 14 BENEFITS MANAGERS' PHONE NUMBERS IN THE RIGHT COLUMN. SO WE
10:08AM 15 HAVE A MUCH MORE COMPLEX SYSTEM THAN WE DID. AND WE HAD A
10:08AM 16 LOT OF PROBLEMS WITH THE SYSTEM BEFORE IT BECAME MORE COMPLEX.

10:08AM 17 THE DEFENDANTS TOLD THE STATE LEGISLATURE--THIS WAS
10:08AM 18 EARLY INTO THE IMPLEMENTATION, BUT THEY TOLD THEM THAT SOME
10:08AM 19 MANAGED-CARE ORGANIZATIONS, OR HMO'S, INCORRECTLY LOADED THE
10:08AM 20 FORMULARY FILE. THAT WOULD MEAN THE FORMULARY IS THE MORE
10:09AM 21 GENERAL LIST OF THE DRUGS THAT MEDICAID COVERS, NEVER MIND
10:09AM 22 WHETHER THEY'RE PREFERRED OR NOT. THAT'S THE FORMULARY. SOME
10:09AM 23 OF THEM INCORRECTLY LOADED THAT. ONE OF THEM INCORRECTLY
10:09AM 24 LOADED ELIGIBILITY DATA SO THAT CHILDREN IN THEIR HMO--PEOPLE
10:09AM 25 IN THEIR HMO WITH A PRESCRIPTION COULDN'T BEGIN TO GET IT

10:09AM 1 FILLED BECAUSE THEY WEREN'T IN THE MCO'S, THE HMO'S SYSTEM, AS
10:09AM 2 THEIR ENROLLEES.

10:09AM 3 THIS MANAGED-CARE SYSTEM ALSO INTRODUCED ANOTHER
10:09AM 4 BEND IN THE ROAD WHERE THINGS CAN GO WRONG AND DO GO WRONG, AND
10:09AM 5 THAT IS, AT FIRST, WHEN MEDICAID WAS HANDLED THROUGH THE VENDOR
10:09AM 6 DRUG PROGRAM, PEOPLE JUST HAD TO BE ENROLLED IN MEDICAID. AND
10:09AM 7 THAT WAS THE ONLY THING THAT HAD TO GET INTO THEIR SYSTEM FOR
10:09AM 8 THEIR PRESCRIPTION TO--ASSUMING IT WAS A PREFERRED DRUG--TO GO
10:09AM 9 THROUGH PROPERLY.

10:09AM 10 NOW PEOPLE ENROLL IN MEDICAID AND THEN AFTER THAT
10:10AM 11 THEY CHOOSE AN HMO. AND THERE ARE TWO ITEMS OF--THERE ARE TWO
10:10AM 12 POINTS AT WHICH THE INFORMATION HAS TO BE IN THE SYSTEM AND IN
10:10AM 13 THE SYSTEM PROPERLY OR NO PRESCRIPTION IS GOING TO GO THROUGH
10:10AM 14 THE ELECTRONIC SYSTEM FOR THAT PERSON.

10:10AM 15 IN ADDITION, DEFENDANTS HAVE PERMITTED THE HMO'S TO
10:10AM 16 SLASH THE DISPENSING FEES OF THE PHARMACIES. WE DON'T KNOW
10:10AM 17 WHAT THEY ARE IN ALL CASES, BUT WE KNOW THAT IT HAS BEEN A
10:10AM 18 MAJOR CONCERN OF PHARMACISTS THAT THE DISPENSING FEES HAVE BEEN
10:10AM 19 CUT. AND WHEN WE LOOK TO WHY PHARMACISTS DON'T DO WHAT THE LAW
10:10AM 20 REQUIRES THEM TO DO, WHAT THE DECREE REQUIRES THEM TO DO, THIS
10:10AM 21 COULD BE A BIG FACTOR. WE KNOW THAT THE DISPENSING FEE WAS
10:10AM 22 \$7.50 PRIOR TO MARCH OF 2012. FROM DEFENDANTS' EXHIBITS, THEIR
10:11AM 23 EXAMPLES OF DISPENSING FEES AS LOW AS A DOLLAR 75 OR A DOLLAR
10:11AM 24 25, PERHAPS THE PHARMACISTS ARE THINKING "THAT'S JUST NOT
10:11AM 25 ENOUGH MONEY FOR ME TO DO THIS, EVEN IF I'VE BEEN TOLD THE LAW

10:11AM 1 REQUIRES IT." IT'S PART OF THE DEFENDANTS HAVE GOT TO SET UP A
10:11AM 2 SYSTEM THAT WORKS. AND THIS ONE OBVIOUSLY AND CLEARLY DOES NOT
10:11AM 3 WORK AND THERE ARE STILL MAJOR PROBLEMS.

10:11AM 4 THE COURT: OKAY. YOU MENTIONED DECREE PARAGRAPHS 3
10:11AM 5 AND 190.

10:11AM 6 MS. SWANSON: YES.

10:11AM 7 THE COURT: WE'VE ALREADY COVERED THE CAO. AND THEN
10:11AM 8 THERE ARE ALSO PARAGRAPHS 124 THROUGH 130.

10:11AM 9 MS. SWANSON: YES, YOUR HONOR. THESE ARE ABOUT
10:11AM 10 EDUCATING PHARMACISTS ABOUT WHAT MEDICAID COVERS. BECAUSE
10:12AM 11 IF THEY DON'T UNDERSTAND WHAT MEDICAID COVERS, WHAT THEY CAN
10:12AM 12 PROVIDE AND GET PAID BY MEDICAID, IT'S LIKELY THAT FAMILIES
10:12AM 13 WILL NOT BE ABLE TO GET WHAT THEIR CHILDREN NEED FROM
10:12AM 14 PHARMACIES. AND THAT IS, IN FACT, WHAT THESE PARAGRAPHS SPEAK
10:12AM 15 TO. THEY REFER TO--AND ON THE FIRST PAGE OF THE CORRECTIVE
10:12AM 16 ACTION ORDER, ONE OF THOSE PARAGRAPHS IS QUOTED. IT REFERS TO
10:12AM 17 LOOKING AT WHETHER PHARMACISTS KNOW THESE ITEMS, WHAT'S COVERED
10:12AM 18 BY MEDICAID, OR WHETHER THEY DON'T. AND IF THEY DON'T, THEN
10:12AM 19 THE DEFENDANTS NEED TO DO EFFECTIVE EDUCATION FOR THEM.

10:12AM 20 THE COURT: OKAY. I'M JUST LOOKING THROUGH THESE
10:12AM 21 PARAGRAPHS. SOME OF THESE PARAGRAPHS 124 THROUGH 130 ARE
10:12AM 22 SIMPLY OBSERVATIONS--

10:13AM 23 MS. SWANSON: THAT IS TRUE, YOUR HONOR.

10:13AM 24 THE COURT: --MADE BY THE COURT.

10:13AM 25 MS. SWANSON: HOWEVER, 129 AND 130 REFER TO

10:13AM 1 IMPLEMENTING INITIATIVES TO EFFECTIVELY INFORM PHARMACISTS,
10:13AM 2 AN INITIATIVE TO ORALLY INFORM PHARMACISTS.

10:13AM 3 THE COURT: YES.

10:13AM 4 MS. SWANSON: AND THE TERM "EFFECTIVE," WE HAVE TO
10:13AM 5 LOOK BACK TO OTHER PARTS OF THE DECREE. AND WE MUST DO SO
10:13AM 6 IN ORDER TO LOOK AT WHAT WAS MEANT BY THAT TERM. EFFECTIVE
10:13AM 7 EDUCATION FOR PHARMACISTS WOULD BE EDUCATION THAT WOULD CAUSE
10:13AM 8 THEM TO ACT IN SUCH A WAY THAT CHILDREN ARE ABLE TO GET WHAT
10:13AM 9 THEY NEED THROUGH THOSE PHARMACISTS. AND THAT CERTAINLY HAS
10:13AM 10 NOT HAPPENED.

10:13AM 11 NOW, DEFENDANTS HAVE DONE A LOT OF WEB-BASED--
10:14AM 12 THEY'VE PUT A LOT OF INFORMATION ON THE INTERNET, ON WEB SITES
10:14AM 13 THAT PHARMACISTS CAN GET AT, THEY HAVE CONTACTED THE TEXAS
10:14AM 14 PHARMACY ASSOCIATION, BUT THE EVIDENCE SHOWS--AND IT'S
10:14AM 15 DEFENDANTS' EVIDENCE AND THEIR SURVEYS--SHOWS THAT PHARMACISTS
10:14AM 16 STILL DO NOT HAVE MUCH OF A CLUE ABOUT HOW TO DEAL WITH THESE
10:14AM 17 ISSUES.

10:14AM 18 THE COURT: OKAY. AND WHAT IS YOUR EVIDENCE THAT
10:14AM 19 THE STATE HAS NOT PROVIDED INTENSIVE, TARGETED EDUCATIONAL
10:14AM 20 EFFORTS FOR PHARMACIES AND HAS NOT TRAINED THEIR STAFF AT THEIR
10:14AM 21 OMBUDSMAN'S OFFICE AND HAS NOT EFFECTIVELY INFORMED PHARMACISTS
10:14AM 22 ABOUT EPSDT?

10:15AM 23 MS. SWANSON: WELL, CONCERNING THE FAILURE TO
10:15AM 24 PROVIDE TARGETED AND INTENSIVE EDUCATION FOR PHARMACISTS THAT
10:15AM 25 WERE IDENTIFIED AS NOT FOLLOWING THE LAW, THERE ARE SEVERAL

10:15AM 1 SOURCES FOR THAT, INCLUDING DEFENDANTS' OWN PLEADINGS. BUT LET
10:15AM 2 ME SEE. A COPY OF THE ACTUAL ONE LETTER THAT THEY SENT IS PART
10:15AM 3 OF THEIR FILING AND THEIR RESPONSE. AND THAT ALONE TELLS US
10:16AM 4 SOMETHING JUST BY LOOKING AT THIS LETTER. THIS IS THE FIRST
10:16AM 5 PAGE OF THE LETTER. THE REST OF IT HAS SUMMARIES OF FEDERAL
10:16AM 6 AND STATE LAW. BUT HERE IS THE ACTUAL LETTER.

10:16AM 7 THE COURT: COULD YOU TELL ME WHAT EXHIBIT THAT IS?

10:16AM 8 MS. SWANSON: IT IS EXHIBIT 1 TO THEIR RESPONSE TO
10:16AM 9 OUR MOTION.

10:16AM 10 THE COURT: OKAY.

10:16AM 11 MS. SWANSON: IT'S PAGE 103. I'M SORRY WE DON'T
10:16AM 12 HAVE DOCUMENT NUMBERS FOR YOU, BUT THESE WERE FILED UNDER SEAL.

10:16AM 13 THE COURT: OKAY.

10:16AM 14 MS. SWANSON: BUT IT'S PAGE 103.

10:16AM 15 THE COURT: ALL RIGHT.

10:16AM 16 MS. SWANSON: THAT IS THE LETTER.

10:16AM 17 THE COURT: ALL RIGHT. WAIT A MINUTE. DON'T MOVE
10:16AM 18 IT YET.

10:16AM 19 MS. SWANSON: I'M SORRY?

10:16AM 20 THE COURT: COULD YOU LEAVE IT ON THE SCREEN JUST
10:16AM 21 FOR A MOMENT?

10:18AM 22 MS. SWANSON: OKAY.

10:18AM 23 THE COURT: OKAY. EXHIBIT 1 OF THE DEFENDANTS'
10:18AM 24 RESPONSE TO THE PLAINTIFFS' MOTION, WHICH IS DOCKET 971, IS A
10:18AM 25 MAY 29TH, 2009, LETTER. IT LOOKS LIKE IT WAS THE SAME LETTER

10:18AM 1 SENT TO ALL PHARMACIES THAT, DESPITE PROCESSING A SIGNIFICANT
10:18AM 2 VOLUME OF MEDICAID PRESCRIPTIONS, APPEARED TO BE PROCESSING
10:18AM 3 A LOWER-THAN-EXPECTED PERCENTAGE OF 72-HOUR PRESCRIPTIONS.
10:18AM 4 AND SO--PAGE 1 OF 4. THERE MUST BE MORE TO IT.

10:19AM 5 MS. SWANSON: THERE IS.

10:19AM 6 THE COURT: OKAY. IT DOES ADVISE THE PHARMACIES
10:19AM 7 ABOUT THE MEDICAID CHILDREN'S HEALTH INSURANCE PROGRAM, THE
10:19AM 8 CHILDREN WITH SPECIAL HEALTHCARE NEEDS SERVICES PROGRAM, AND
10:19AM 9 THE KIDNEY HEALTHCARE PROGRAM, AND THAT THE PHARMACY IS IN
10:19AM 10 A POSITION TO ASSIST THESE PATIENTS WITH ACCESS TO BENEFITS
10:19AM 11 BY DISPENSING A 72-HOUR EMERGENCY SUPPLY ANYTIME PRIOR
10:19AM 12 AUTHORIZATION IS NOT AVAILABLE. AND THEN IT GOES INTO A
10:20AM 13 DISCUSSION OF THE PREFERRED-DRUG LIST THAT REQUIRES PRIOR
10:20AM 14 AUTHORIZATION, AND THAT THE PHARMACY SHOULD DISPENSE THE
10:20AM 15 72-HOUR EMERGENCY SUPPLY OF THE DRUG EVEN THOUGH PRIOR
10:20AM 16 AUTHORIZATION IS REQUIRED. IT ALSO INFORMS THE PHARMACY--
10:20AM 17 AND I'M REFERRING TO THE LETTER--THAT THE PHARMACY WILL BE
10:20AM 18 PAID FOR THE QUANTITY DISPENSED OF THE MEDICINE PLUS THE FULL
10:20AM 19 DISPENSING FEE. THE LETTER ENCLOSES FEDERAL AND STATE LAWS.
10:20AM 20 IT REFERS THE PHARMACY TO THE VENDOR DRUG WEB SITE. IT INFORMS
10:21AM 21 THE PHARMACY THAT IT IS IMPORTANT TO EDUCATE ITS STAFF AND
10:21AM 22 ENSURE THEY UNDERSTAND THE 72-HOUR EMERGENCY SUPPLY.

10:21AM 23 COULD YOU GO TO PAGE 2 OF THE ORDER?

10:21AM 24 MS. SWANSON: YES. THESE ARE ATTACHMENTS.

10:21AM 25 THE COURT: OKAY. PAGE 2 LOOKS LIKE A REFERENCE TO

10:21AM 1 TITLE 42 OF THE U.S. CODE, SECTION 1396R-8(D)(5), WHICH TALKS
10:21AM 2 ABOUT PRIOR AUTHORIZATION PROGRAMS.

10:21AM 3 COULD YOU GO TO PAGE 3?

10:21AM 4 MS. SWANSON: YES.

10:21AM 5 THE COURT: THAT PAGE QUOTES FROM STATE LAW, TEXAS
10:22AM 6 ADMINISTRATIVE CODE, TITLE 1, PART 15, CHAPTER 354, SUBCHAPTER
10:22AM 7 F, DIVISION 2, RULE 354.1832 REGARDING REQUESTS FOR PRIOR
10:22AM 8 AUTHORIZATION, EMERGENCY REQUESTS FOR PRIOR AUTHORIZATION.
10:22AM 9 OKAY.

10:22AM 10 AND COULD YOU SHOW ME PAGE 4? OKAY. CONTINUATION
10:22AM 11 OF STATE LAW.

10:22AM 12 NOW, MS. SWANSON, DO YOU CONTEND THAT LETTER IS
10:22AM 13 INADEQUATE OR THAT MORE SHOULD HAVE BEEN DONE IN ADDITION TO
10:22AM 14 THE LETTER?

10:22AM 15 MS. SWANSON: WE CONTEND BOTH, BUT ESPECIALLY MORE
10:22AM 16 SHOULD HAVE BEEN DONE IN ADDITION TO THE LETTER. FAR MORE
10:23AM 17 SHOULD HAVE BEEN DONE. THERE'S NOTHING INTENSIVE ABOUT ONE
10:23AM 18 LETTER, AND THERE'S CERTAINLY NOTHING TARGETED.

10:23AM 19 THE COURT: IT WAS SENT TO ALL PHARMACIES THAT--

10:23AM 20 MS. SWANSON: IT WAS SENT TO PHARMACIES THAT WERE
10:23AM 21 IDENTIFIED AS DEFICIENT IN 72-HOUR SUPPLY.

10:23AM 22 THE COURT: IS THAT NOT TARGETING?

10:23AM 23 MS. SWANSON: NO. BECAUSE THE PREVIOUS BULLET POINT,
10:23AM 24 OR BULLET POINTS, OF THE CAO REFERRED TO HOW WE DETERMINE WHO
10:23AM 25 TO SEND THE LETTER TO.

10:23AM 1 THE COURT: UH-HUH.

10:23AM 2 MS. SWANSON: WHEN WE GET DOWN TO PAGE 4,
10:23AM 3 "TARGETING" SHOULD MEAN SOMETHING LIKE, "LET'S LOOK AT THIS
10:23AM 4 PARTICULAR PHARMACY AND FIGURE OUT WHAT'S GOING WRONG. IS
10:23AM 5 IT A CERTAIN TYPE OF DRUG OR DRUGS? IS IT A CERTAIN SHIFT OF
10:23AM 6 WORKERS? IS IT SOMETHING--WHAT ACTUALLY IS HAPPENING AT THIS
10:24AM 7 PHARMACY THAT CAUSES THE LAW NOT TO BE FOLLOWED?"

10:24AM 8 NOT ONLY DID THEY NOT DO THAT, THEY IMPLY IN THE
10:24AM 9 ONE LETTER THAT THEY SENT THAT THEY REALLY AREN'T TELLING THE
10:24AM 10 PHARMACY THEY'RE SURE IT HAS A PROBLEM. "MAYBE YOU HAVE A
10:24AM 11 PROBLEM." THEY COULD HAVE DETERMINED BY LOOKING AT WHAT
10:24AM 12 HAPPENED TO THOSE PRESCRIPTIONS AFTER THEY WERE REJECTED.
10:24AM 13 THEY COULD HAVE DETERMINED HOW BIG A PROBLEM THAT PHARMACY HAD.
10:24AM 14 BUT THEY DIDN'T DO THAT. THEY JUST SENT OUT THE SAME FORM
10:24AM 15 LETTER WITH NO FOLLOW-UP, ASSUMING THAT THE PHARMACY SIGNED FOR
10:24AM 16 THE LETTER. I DON'T KNOW ANY MEANING OF THE TERM "INTENSIVE"
10:24AM 17 THAT THAT WOULD FALL WITHIN.

10:24AM 18 THE COURT: WELL, THE LETTERS WERE SENT TO THOSE
10:24AM 19 PHARMACIES THAT FILLED A LOT OF MEDICAID PRESCRIPTIONS BUT
10:24AM 20 NOT A LOT OF 72-HOUR--WHAT?

10:25AM 21 MS. SWANSON: SUPPLIES.

10:25AM 22 THE COURT: SUPPLIES.

10:25AM 23 MS. SWANSON: OR NO 72-HOUR SUPPLIES. YES, THEY
10:25AM 24 WERE.

10:25AM 25 THE COURT: AND THE BULLET POINT ON PAGE 4 OF THE

10:25AM 1 CAO REQUIRES INTENSIVE, TARGETED EDUCATIONAL EFFORTS TO THOSE
10:25AM 2 PHARMACIES FOR WHICH THE DATA SUGGESTS A LACK OF KNOWLEDGE
10:25AM 3 OF THE 72-HOUR PRESCRIPTIONS POLICY. I MEAN, THE STUDY WAS
10:25AM 4 DESIGNED TO SHOW THEM WHICH PHARMACIES ARE NOT UNDERSTANDING
10:25AM 5 THE 72-HOUR POLICY. EITHER THEY DISPENSED MEDICAID
10:25AM 6 PRESCRIPTIONS AND THEY DISPENSED NO 72-HOUR SUPPLIES OR
10:25AM 7 THEY DISPENSED MEDICAID PRESCRIPTIONS AND THEY DISPENSED
10:25AM 8 A LOWER-THAN-EXPECTED PERCENTAGE OF 72-HOUR SUPPLIES.

10:25AM 9 MS. SWANSON: YES, YOUR HONOR.

10:25AM 10 THE COURT: SO THOSE WOULD BE THE PHARMACIES YOU
10:25AM 11 WOULD WANT TO SEND A LETTER LIKE THIS TO. AND YOU SAID IN
10:26AM 12 ADDITION TO THIS LETTER, LET'S SEE, THE STATE CALLED THE
10:26AM 13 CORPORATE HEADQUARTERS OF THESE PHARMACIES, IS THAT RIGHT?

10:26AM 14 MS. SWANSON: THAT IS CORRECT. AND WHERE WE
10:26AM 15 GET THAT, THE DESCRIPTION OF WHAT WAS DONE THERE, IS THE
10:26AM 16 DECLARATION OF DEFENDANTS' WITNESS MS. CASTARENO. IT IS
10:26AM 17 EXHIBIT 2 TO THEIR RESPONSE TO OUR MOTION. AND HER DESCRIPTION
10:26AM 18 IS ON PAGES 8 AND 9.

10:26AM 19 THE COURT: HER DESCRIPTION OF THE PHONE CALLS?

10:26AM 20 MS. SWANSON: HER DESCRIPTION OF THE PHONE CALLS AND
10:26AM 21 THE LETTER-SENDING PROCESS. SHE TALKS ABOUT IF THEY DIDN'T
10:26AM 22 SIGN FOR THE LETTER, WHAT HAPPENED AFTER THAT. IT SAYS THAT
10:26AM 23 ONLY 12 OUT OF THE 822 IDENTIFIED PHARMACIES GOT EVEN ONE
10:27AM 24 PERSONAL VISIT.

10:28AM 25 THE COURT: OKAY. I'M LOOKING AT EXHIBIT 2 FILED

10:29AM 1 BY THE DEFENDANTS. WHAT ARE YOU FOCUSING ON, MS. SWANSON?

10:29AM 2 MS. SWANSON: ON PAGES 8 AND 9, I BELIEVE IT IS.

10:29AM 3 THE COURT: I DON'T HAVE PAGES 8 AND 9. MY EXHIBIT
10:29AM 4 2 ENDS AT PAGE 7. OH, I'M SORRY. I'M LOOKING AT THE WRONG
10:29AM 5 MOTION HERE.

10:29AM 6 MS. SWANSON: ON PAGE 8, IN PARAGRAPH 24, I BELIEVE
10:29AM 7 SHE SUMMARIZES WHAT WAS DONE.

10:29AM 8 THE COURT: OKAY.

10:29AM 9 MS. SWANSON: THEN, CONCERNING WHAT HAPPENS IN
10:29AM 10 THE OMBUDSMAN'S OFFICE, OR FREQUENTLY DOESN'T HAPPEN, THE
10:30AM 11 DESCRIPTION OF THAT IS IN EXHIBIT 10 TO DEFENDANTS' RESPONSE.
10:30AM 12 IT IS THE DECLARATION OF DEFENDANTS' EMPLOYEE DAWN REHBEIN.
10:30AM 13 AND THAT DESCRIPTION BEGINS ON PAGE 7 AND CONTINUES ON TO PAGE
10:30AM 14 8 AND IT DESCRIBES HOW IN MANY INSTANCES HHSC STAFF, INCLUDING
10:30AM 15 OMBUDSMAN'S STAFF, HAVE BEEN REFERRING FAMILIES TO THE HMO'S
10:30AM 16 RATHER THAN IMMEDIATELY ADDRESSING THEIR PROBLEMS, WHICH IS
10:30AM 17 WHAT THE CAO REQUIRED THAT THEY BE TRAINED TO DO.

10:31AM 18 THE COURT: OKAY. AND DID YOU SAY THAT WAS AN
10:31AM 19 EXHIBIT?

10:31AM 20 MS. SWANSON: YES, YOUR HONOR. IT IS EXHIBIT 10
10:31AM 21 TO THE DEFENDANTS' RESPONSE, MS. REHBEIN'S DECLARATION.

10:31AM 22 THE COURT: WOULD YOU TELL ME AGAIN WHAT SHE SAYS?

10:31AM 23 MS. SWANSON: SHE SAYS THAT--ON PAGE 7, SHE SAYS
10:31AM 24 THAT FOR THE FIRST SEVERAL MONTHS AFTER MARCH 1ST OF 2012, WHEN
10:31AM 25 THERE WAS THIS MAJOR TRANSITION, OMBUDSMAN'S STAFF REFERRED

10:31AM 1 CALLERS TO THE MANAGED-CARE ORGANIZATION FOR PRESCRIPTION
10:31AM 2 CONCERNS. THERE'S SOME UNCERTAINTY ABOUT WHAT EXACTLY THE
10:32AM 3 CALLERS HAVE TO DO WITH THE HMO WHEN THEIR CALLS ARE REFERRED
10:32AM 4 TO THE HMO. DO THEY HAVE TO EXHAUST THE HMO'S COMPLAINT
10:32AM 5 PROCESS? DO THEY HAVE TO JUST TALK TO THE HMO AND GET TURNED
10:32AM 6 DOWN? OR WHAT DO THEY HAVE TO DO? WE DO KNOW FROM THE ONE HMO
10:32AM 7 LOG THAT WE GOT IN DISCOVERY THAT SOMETIMES THESE PEOPLE ARE
10:32AM 8 TOLD THINGS LIKE, "WELL, CALL THE DOCTOR" OR, "YES, YOU HAVE
10:32AM 9 A COPAYMENT," ALTHOUGH BY LAW THEY DON'T. THEY MAY GET THE
10:32AM 10 CORRECT RESPONSE THERE, THEY MAY NOT GET THE CORRECT RESPONSE
10:32AM 11 THERE, AND THEY MAY THEN THINK, "WELL, THERE'S JUST NOTHING
10:32AM 12 I CAN DO. THESE PEOPLE TOLD ME THAT MY CHILD CAN'T GET THAT
10:32AM 13 PRESCRIPTION." SO IT'S VERY WRONG TO SEND THESE PEOPLE IN THAT
10:32AM 14 DIRECTION. AND THAT'S NOT WHAT THE CAO REQUIRED. AND YET AT
10:32AM 15 TIMES THAT'S WHAT IS HAPPENING. NOT AT ALL TIMES AND NOT IN
10:33AM 16 ALL CIRCUMSTANCES, BUT BETWEEN MARCH AND AUGUST OF 2012 THAT'S
10:33AM 17 WHAT HAPPENED. ACCORDING TO HER, THIS STILL HAPPENS WHEN THERE
10:33AM 18 ARE A LOT OF PEOPLE HOLDING ON THE PHONE TO TRY TO GET THROUGH
10:33AM 19 TO THE OMBUDSMAN'S OFFICE, WHICH MAKES US WONDER IF THE
10:33AM 20 DEFENDANTS' STATEMENTS TO US ABOUT THE INITIAL PROBLEMS HAVING
10:33AM 21 BLOWN OVER ARE COMPLETELY CORRECT. BUT, ANYWAY, IT'S CLEAR
10:33AM 22 FROM HER DECLARATION THAT THEY DON'T, IN FACT, THINK THEY ARE
10:33AM 23 REQUIRED TO TRAIN THE OMBUDSMAN'S STAFF TO IMMEDIATELY ADDRESS
10:33AM 24 PROBLEMS.

10:34AM 25 THE COURT: SO YOU THINK THAT SHOWS THAT THE STATE

10:34AM 1 HAS NOT TRAINED ITS OMBUDSMAN'S OFFICE?

10:34AM 2 MS. SWANSON: AS THE CAO REQUIRES, YES.

10:34AM 3 THE COURT: OKAY.

10:34AM 4 MS. SWANSON: THAT'S WHAT WE CONTEND.

10:34AM 5 THE COURT: OKAY.

10:34AM 6 MS. SWANSON: NOW, CONCERNING EFFECTIVE EDUCATION
10:34AM 7 FOR PHARMACISTS, WOULD YOU LIKE ME TO SUMMARIZE THE EVIDENCE
10:34AM 8 THAT THAT STILL IS NOT HAPPENING?

10:34AM 9 THE COURT: SURE.

10:34AM 10 MS. SWANSON: THEY ARE PROVIDING EDUCATION FOR
10:34AM 11 PHARMACISTS, BUT IT IS NOT EFFECTIVE. HERE IS THE STUDY, OR
10:34AM 12 PAGE OF THE STUDY, THAT THE DECREE REQUIRED THEM TO DO IN 1996.
10:34AM 13 THIS IS JUST PAGE 1 OF IT. BUT, FOR EXAMPLE, LOOK AT QUESTION
10:34AM 14 1. PHARMACISTS WERE ASKED WHETHER LANCETS FOR DIABETIC
10:35AM 15 MEDICAID PATIENTS COULD BE COVERED THROUGH THE MEDICAID
10:35AM 16 COMPREHENSIVE-CARE PROGRAM, WHICH IS A PROGRAM THAT PROVIDES
10:35AM 17 MEDICAL EQUIPMENT, MEDICAL SUPPLIES, HOME HEALTH SUPPLIES THAT
10:35AM 18 MIGHT NOT OTHERWISE BE COVERED FOR ADULTS. BUT THE QUESTION
10:35AM 19 WAS: "MAY THESE ITEMS BE REIMBURSED BY THE MEDICAID
10:35AM 20 COMPREHENSIVE CARE PROGRAM?" THE CORRECT ANSWER IS "YES."
10:35AM 21 THREE AND NINE-TENTHS PERCENT SAID YES, NINETY-ONE AND
10:35AM 22 SIX-TENTHS PERCENT SAID NO. THAT'S JUST ONE EXAMPLE.
10:35AM 23 IT GOES ON FOR PAGES.

10:35AM 24 THE NEXT SURVEY THAT THEY DID, AND THE MOST RECENT
10:35AM 25 ONE THAT WE KNOW OF, WAS IN 2008.

10:35AM 1 THE COURT: AND WHAT WAS THAT LAST EXHIBIT?

10:35AM 2 MS. SWANSON: I'M SORRY. THAT LAST EXHIBIT WAS
10:36AM 3 EXHIBIT 8 TO OUR RESPONSE TO DEFENDANTS' RULE 60(B)(5) MOTION
10:36AM 4 AND OUR REPLY CONCERNING OUR MOTION TO ENFORCE. IT'S DOCUMENT
10:36AM 5 NUMBER 1006-4.

10:36AM 6 THE COURT: OKAY.

10:36AM 7 MS. SWANSON: IN 2008--THE MOST RECENT SURVEY THAT
10:36AM 8 DEFENDANTS DID OF PHARMACISTS THAT WE'RE AWARE OF IS EXHIBIT 1
10:36AM 9 TO OUR RESPONSE--REPLY. IT'S DOCUMENT 1004-1. AND IF YOU LOOK
10:36AM 10 AT QUESTION 1, "DO YOU KNOW HOW TO HANDLE PRESCRIPTIONS FOR
10:36AM 11 MEDICAL DEVICES LIKE AEROSOL SPACERS"--WHICH ARE FOR KIDS WITH
10:36AM 12 ASTHMA AND OTHER TYPES OF BREATHING PROBLEMS--"OR ANY OTHER
10:37AM 13 DURABLE MEDICAL EQUIPMENT OR PRODUCTS?" WE HOPED THAT SOME
10:37AM 14 OF THEM WOULD KNOW, BUT FEWER THAN HALF OF THEM SAID THAT
10:37AM 15 THEY KNEW HOW TO DO THAT. THIS IS 2008, AFTER DEFENDANTS'
10:37AM 16 EDUCATIONAL EFFORTS HAD GONE ON FOR SEVERAL YEARS. WHATEVER
10:37AM 17 DEFENDANTS ARE DOING, IT IS NOT WORKING WITH RESPECT TO
10:37AM 18 PHARMACISTS.

10:37AM 19 WE DO HAVE ONE ANSWER THAT IS BETTER THAN IT
10:37AM 20 PROBABLY WOULD HAVE BEEN IN 2007, AND THAT IS TO QUESTION 3.
10:37AM 21 "ARE YOU AWARE OF THE EMERGENCY PROVISION FOR 72-HOUR SUPPLY OF
10:37AM 22 DRUGS?" AND 92 PERCENT OF THEM SAY YES, THEY'RE AWARE OF IT.
10:37AM 23 THAT DOESN'T ASK WHETHER THEY DO IT OR WHETHER THEY KNOW WHEN
10:37AM 24 TO DO IT, BUT AT LEAST THEY ARE AWARE OF IT.

10:37AM 25 THE SURVEY CONTINUES AND ASKS ABOUT "DO YOU KNOW HOW

10:38AM 1 MANY PRESCRIPTIONS A CHILD UNDER THE AGE OF 21 MAY RECEIVE?"

10:38AM 2 YOU WOULD CERTAINLY WANT AND NEED A HUNDRED PERCENT
10:38AM 3 RESPONSE OF "YES, I KNOW THAT THEY GET UNLIMITED PRESCRIPTIONS."
10:38AM 4 AND THE REASON THAT'S AN ISSUE IS ADULTS ON MEDICAID WHO ARE
10:38AM 5 NOT IN MANAGED CARE DO NOT NECESSARILY GET ALL THE
10:38AM 6 PRESCRIPTIONS THEY NEED. THEY GET UP TO THREE A MONTH IN SOME
10:38AM 7 INSTANCES.

10:38AM 8 SO IT'S VERY IMPORTANT THAT PHARMACISTS UNDERSTAND
10:38AM 9 THAT THOSE LIMITATIONS THAT APPLY TO SOME ADULTS ON MEDICAID
10:38AM 10 DON'T APPLY TO CHILDREN, AND YET WE DON'T HAVE A HUNDRED
10:38AM 11 PERCENT RESPONSE HERE. WE GET AN 83 PERCENT RESPONSE.

10:38AM 12 THEN WE HAVE QUESTION 6 HERE: ARE YOU EVEN AWARE OF
10:38AM 13 THE COMPREHENSIVE-CARE PROGRAM THROUGH WHICH CHILDREN CAN GET
10:38AM 14 THESE ITEMS OF MEDICAL SUPPLIES, MEDICAL EQUIPMENT, ET CETERA,
10:39AM 15 THAT MIGHT NOT NECESSARILY BE AVAILABLE TO ADULTS AND THAT
10:39AM 16 AREN'T AVAILABLE THROUGH THE PRESCRIPTION-DRUG PROGRAM?

10:39AM 17 AND, NO, MOST OF THEM HAVE NO CLUE ABOUT THAT
10:39AM 18 EITHER. SO THIS IS A PRESCRIPTION FOR CHILDREN NOT BEING
10:39AM 19 ABLE TO GET WHAT THEY NEED, IS BASICALLY WHAT IT IS.

10:39AM 20 THE COURT: AND THAT EXHIBIT WAS WHAT?

10:39AM 21 MS. SWANSON: AND THAT EXHIBIT WAS EXHIBIT 1 TO OUR
10:39AM 22 RESPONSE TO THE DEFENDANTS' RULE 60(B)(5) MOTION.

10:39AM 23 THE COURT: OKAY.

10:39AM 24 MS. SWANSON: NOW, THERE'S ALSO SOME TESTIMONY BY
10:39AM 25 DOCTORS THAT I WOULD LIKE TO SHOW YOU JUST SOME SHORT EXCERPTS

10:39AM 1 FROM, IF I COULD DO THAT, BECAUSE I DON'T WANT TO LEAVE THE
10:39AM 2 IMPRESSION THAT THE ONLY PROBLEMS WITH THE PREFERRED LIST--
10:39AM 3 DRUG LIST ARE THAT DOCTORS DON'T UNDERSTAND IT OR DON'T TAKE
10:39AM 4 THE TIME TO LOOK AT IT. THERE'S SOME TESTIMONY BY TREATING
10:40AM 5 DOCTORS THAT ESPECIALLY SINCE MARCH OF 2012, NOT ALL THE DRUGS
10:40AM 6 THAT ARE SUPPOSED TO BE PREFERRED WILL ACTUALLY GET APPROVED
10:40AM 7 WHEN THE PRESCRIPTION GOES TO THE HMO'S PHARMACY BENEFITS
10:40AM 8 MANAGER.

10:40AM 9 FOR EXAMPLE, THE DEPOSITION OF DR. RIDER, WHICH IS
10:40AM 10 DOCUMENT 1005-1, EXHIBIT 3 TO, I BELIEVE, OUR RESPONSE AND
10:40AM 11 REPLY. BUT, ANYWAY, IT'S DOCUMENT 1005-1.

10:40AM 12 SHE'S ASKED: DO YOU FEEL YOU HAVE A FIRM COMMAND
10:40AM 13 OR HAVE THE ABILITY TO OBTAIN READILY THE INFORMATION OF WHICH
10:40AM 14 DRUGS YOU PRESCRIBE ON THE MEDICAID PREFERRED-DRUG LIST?

10:40AM 15 HER ANSWER IS: I CAN FIND OUT WHICH MEDICATIONS
10:40AM 16 ARE ON IT, BUT I CAN'T FIND OUT WHICH FORMULATIONS OF THOSE
10:41AM 17 MEDICATIONS ARE ON IT AND I CAN'T FIND OUT WHICH MANUFACTURERS
10:41AM 18 HAVE THEIR MEDICATIONS APPROVED AND WHICH PHARMACIES CARRY THE
10:41AM 19 DRUGS THAT THE MANUFACTURERS MAKE.

10:41AM 20 SHE SAYS: ONE OTHER AREA I'VE HAD REJECTED WAS THAT
10:41AM 21 I WROTE MORE THAN THE MAXIMUM APPROVED SUPPLY OF A SPECIFIC
10:41AM 22 MEDICATION. THAT WAS U.S. SCRIPTS, WHICH IS ONE OF THE
10:41AM 23 PHARMACY BENEFITS MANAGERS THAT REJECTED THAT ONE.

10:41AM 24 SHE SAYS: THE ISSUE OF THE MAXIMUM SUPPLY, THAT'S
10:41AM 25 SPECIFIC TO THE PHARMACY BENEFITS MANAGERS. SO THEY HAVE

10:41AM 1 ANOTHER SET OF RULES, WHICH IS INVISIBLE TO US. OR AT LEAST
10:41AM 2 AS FAR AS I KNOW, THEY'RE INVISIBLE.

10:41AM 3 AND THAT IS A PEDIATRICIAN WHO HAS BEEN TREATING
10:41AM 4 MEDICAID PATIENTS AND OTHER CHILDREN FOR DECADES.

10:41AM 5 THE COURT: AND THAT IS DR. RIDER, DID YOU SAY?

10:42AM 6 MS. SWANSON: DR. RIDER, R-I-D-E-R.

10:42AM 7 THE COURT: AND THAT IS EXHIBIT 1005-1?

10:42AM 8 MS. SWANSON: DOCUMENT 1005-1.

10:42AM 9 THE COURT: OKAY.

10:42AM 10 MS. SWANSON: THEN SHE'S ASKED: WHEN YOU TESTIFIED
10:42AM 11 IN 2012 THAT IN MARCH OF 2012 THE PROGRAM'S PROBLEMS BECAME
10:42AM 12 MARKEDLY WORSE, IS THIS REALLY FOCUSED ON THE NUMBER OF PRIOR
10:42AM 13 AUTHORIZATION REQUESTS THAT YOUR OFFICE IS NEEDING TO MAKE?

10:42AM 14 "YES."

10:42AM 15 AND SHE'S ASKED: BUT IT'S NOT ACTUALLY A CHANGE IN
10:42AM 16 THE FORMULARY, IT'S JUST THAT YOU NEED TO FILL OUT MORE FORMS?

10:42AM 17 AND SHE SAYS: YES, BUT PBM'S--THE PHARMACY BENEFITS
10:42AM 18 MANAGERS--ARE FUNCTIONING AS ANOTHER BOTTLENECK, OR YOU MIGHT
10:42AM 19 SAY ANOTHER SCREEN. SO THERE'S TWO PROCESSES THAT WE HAVE TO
10:42AM 20 GO THROUGH RATHER THAN ONE. IN OTHER WORDS, EVEN IF IT IS ON
10:42AM 21 THE PREFERRED-DRUG LIST AND EVEN IF IT SHOULD BE APPROVED, THAT
10:43AM 22 DOES NOT MEAN THE PHARMACY BENEFITS MANAGER IS GOING TO DO IT.

10:43AM 23 SHE ALSO TESTIFIES AT MORE LENGTH ABOUT HOW SOME
10:43AM 24 OF THESE ISSUES HAPPENED WHEN SHE'S ATTEMPTED TO GET MEDICAL
10:43AM 25 EQUIPMENT, MEDICAL SUPPLIES FOR CHILDREN. SHE STOPPED BEING A

10:43AM 1 GENERAL PEDIATRICIAN IN 2011 AND BECAME FOCUSED ON BEHAVIORAL
10:43AM 2 HEALTHCARE. SO SOME OF THESE INSTANCES SHE'S TALKING ABOUT
10:43AM 3 WERE IN 2011. BUT, FOR EXAMPLE, ON PAGE 122, SHE SAYS: I
10:43AM 4 RECALL IN THE PAST YEAR AND A HALF, WHEN I WAS DOING GENERAL
10:43AM 5 PEDIATRICS, THE INABILITY TO GET A PRESCRIPTION FOR IRON TO
10:43AM 6 TREAT AN ANEMIC CHILD.

10:43AM 7 AND CERTAINLY WE WANT AN ANEMIC CHILD TO BE ABLE TO
10:44AM 8 GET AN IRON PRESCRIPTION, BECAUSE IT IS THE SIMPLEST AND THE
10:44AM 9 CHEAPEST WAY TO DEAL WITH THE ANEMIA PROBLEM BEFORE IT BECOMES
10:44AM 10 SOMETHING THAT HAS TO BE TREATED IN A FAR MORE EXPENSIVE AND
10:44AM 11 RIGOROUS SETTING, AND DIFFICULT FOR THE CHILDREN.

10:44AM 12 SO I REPORTED THAT TO HHSC, WHO SAID I COULD GET IT
10:44AM 13 THROUGH THE DURABLE MEDICAL EQUIPMENT PROCEDURE.

10:44AM 14 QUESTION: THE CCP, MEANING COMPREHENSIVE CARE
10:44AM 15 PROGRAM?

10:44AM 16 ANSWER: YES. SO I VISITED WITH--YOU KNOW, CALLED
10:44AM 17 AROUND TO THE LOCAL PHARMACIES, SOME OF THE NON-CHAIN ONES
10:44AM 18 WHERE I KNOW THE PEOPLE WELL, AND SAID, "IF I WRITE THIS,
10:44AM 19 CAN YOU FILL IT?" AND THEY SAID, "NO." I MUST HAVE CALLED
10:44AM 20 10 PHARMACIES TO SEE IF THAT WOULD HAPPEN. IT JUST NEVER DID.

10:44AM 21 SHE ALSO DISTINGUISHES, AS DO TWO OF THE OTHER
10:44AM 22 DOCTORS--SHE DISTINGUISHES THE MEDICAID PREFERRED-DRUG LIST AND
10:45AM 23 FORMULARY FROM THOSE OF COMMERCIAL INSURANCE COMPANIES. ALMOST
10:45AM 24 ALL INSURANCE COMPANIES NOW ARE GOING TO HAVE FORMULARIES.
10:45AM 25 DOCTORS KNOW THEY HAVE TO DEAL WITH FORMULARIES. BUT THE

10:45AM 1 DOCTORS HAVE TESTIFIED THAT THIS SITUATION IS DIFFERENT WITH
10:45AM 2 RESPECT TO MEDICAID BECAUSE, FOR EXAMPLE--SHE SAYS: YOU KNOW
10:45AM 3 THAT THE GENERIC IS GOING TO BE THE LEAST EXPENSIVE. IT'S
10:45AM 4 JUST INTUITIVE. YOU DON'T HAVE TO LOOK IT UP EVERY TIME. AND
10:45AM 5 EVEN IF YOU DON'T LOOK IT UP, YOU GET FEWER REJECTIONS ON THE
10:45AM 6 COMMERCIAL.

10:45AM 7 AND SHE'S ASKED: DOES THAT BOIL DOWN TO LOOKING
10:45AM 8 IT UP--THE NEED TO LOOK IT UP MORE OFTEN?

10:45AM 9 AND SHE SAYS: NO, THAT'S A MAJOR DIFFERENCE. IT'S
10:45AM 10 JUST IF YOU HAVE TO LOOK UP EVERY PRESCRIPTION, THAT TAKES
10:45AM 11 TIME. IF YOU ARE A GENERALIST, THERE'S A LOT OF DRUGS. I'VE
10:46AM 12 PRETTY WELL FIGURED OUT THE PSYCHOTROPICS. SO IT TAKES MORE
10:46AM 13 TIME, AND THEN YOU HAVE A COMPLEX PROCESS TO GO THROUGH TO
10:46AM 14 APPEAL.

10:46AM 15 THE LENGTHY APPEAL AND COMPLICATED APPEAL PROCESS.
10:46AM 16 SHE'S ASKED: ISN'T THAT SOMETHING YOU HAVE TO ENGAGE IN WITH
10:46AM 17 A PARTICULAR PHARMACY BENEFITS ASSOCIATION?

10:46AM 18 AND SHE SAYS: ONE HMO'S PHARMACY BENEFITS MANAGER
10:46AM 19 IS THE WORST IN TERMS OF COMPLEX APPEALS. SHE'S HAD TO APPEAL
10:46AM 20 WITH THE OTHERS.

10:46AM 21 THE COURT: "APPEAL" IN THE SENSE OF GETTING PRIOR
10:46AM 22 AUTHORIZATION?

10:46AM 23 MS. SWANSON: WELL, NO, APPEAL WHEN THEY DENY THE
10:46AM 24 PRIOR AUTHORIZATION FOR A MEDICALLY APPROPRIATE DRUG.

10:46AM 25 THE COURT: BECAUSE IT'S, WHAT, NOT ON THE LIST?

10:46AM 1 MS. SWANSON: NO, BECAUSE IT'S A DRUG THAT SHE KNOWS
10:46AM 2 TO BE MEDICALLY APPROPRIATE FOR A PATIENT, SO SHE'S SEEKING
10:47AM 3 PRIOR AUTHORIZATION FOR IT BECAUSE SHE BELIEVES NO OTHER
10:47AM 4 PREFERRED DRUG IS MEDICALLY APPROPRIATE.

10:47AM 5 THE COURT: OKAY.

10:47AM 6 MS. SWANSON: BUT THE HMO TURNS THAT DOWN, SO SHE
10:47AM 7 HAS TO APPEAL.

10:47AM 8 SHE TESTIFIES ABOUT ASTHMA AND PNEUMONIA
10:47AM 9 HOSPITALIZATIONS THAT WERE PREVENTIBLE BECAUSE THE EMERGENCY
10:47AM 10 DEPARTMENT WOULD SEE THE PATIENT, PRESCRIBE MEDICINES, AND THE
10:47AM 11 PATIENT COULDN'T GET THOSE MEDICINES BECAUSE IT REQUIRED PRIOR
10:47AM 12 APPROVAL. THEY WEREN'T GIVEN AN EMERGENCY SUPPLY, THEY DIDN'T
10:47AM 13 KNOW HOW TO REQUEST IT, AND THOSE CHILDREN WENT BACK INTO THE
10:47AM 14 HOSPITAL BECAUSE OF THAT.

10:47AM 15 IT'S NOT ONLY THE CHILDREN WHO HAVE AN INTEREST
10:47AM 16 HERE, IT'S THE TAXPAYERS, BECAUSE IF WE HAVE PREVENTIBLE
10:47AM 17 HOSPITALIZATIONS, EVEN A FEW--AND WE DON'T THINK IT IS AN
10:47AM 18 EVERYDAY EVENT, WE CERTAINLY HOPE IT'S NOT, BUT EVEN A FEW
10:47AM 19 WOULD BE VERY EXPENSIVE EVENTS.

10:48AM 20 DR. WOOD ALSO--HER DEPOSITION IS DOCUMENT 1005-4.
10:48AM 21 DR. WOOD, ALSO A PEDIATRICIAN, TESTIFIES ABOUT THE DIFFERENCES
10:48AM 22 BETWEEN DEALING WITH THE MEDICAID FORMULARY AND THE COMMERCIAL
10:48AM 23 FORMULARY.

10:48AM 24 ON PAGE 19 OF HER DEPOSITION, SHE SAYS: IF YOU
10:48AM 25 PRESCRIBE A MEDICATION, IN GENERAL, MY EXPERIENCE HAS BEEN THAT

10:48AM 1 IF IT IS ON A FORMULARY FOR A COMMERCIAL INSURANCE PLAN, I HAVE
10:48AM 2 NEVER HAD A PROBLEM WITH THAT COMING BACK TO ME BECAUSE THE
10:48AM 3 DOSE WAS A PARTICULAR DOSE.

10:48AM 4 ALSO, SINCE MARCH OF 2012, DOCTORS HAVE TESTIFIED
10:48AM 5 THAT NOW, INSTEAD OF HAVING A MEDICATION AUTHORIZED FOR A YEAR,
10:48AM 6 THE HMO MAY AUTHORIZE IT FOR A MUCH SHORTER PERIOD, EVEN FOR A
10:48AM 7 MONTH OR TWO.

10:48AM 8 SHE SAYS: IT WOULD BE MY OPINION FOR A MEDICATION
10:49AM 9 FOR A CHRONIC ILLNESS THAT HAS BEEN APPROVED A MONTH OR TWO
10:49AM 10 BEFORE, AS THE CLINICIAN, IT DOES NOT MAKE SENSE TO ME THAT
10:49AM 11 THAT MEDICATION WOULD HAVE TO BE REAUTHORIZED AGAIN AFTER
10:49AM 12 ANOTHER MONTH OR TWO.

10:49AM 13 THE HEALTH PLAN PROCESS IS NOT CLEAR TO HER, TO
10:49AM 14 OTHER DOCTORS.

10:49AM 15 SHE DISCUSSES A SPECIFIC INSTANCE WHERE A CHILD HAD
10:49AM 16 A MEDICAL CONDITION THAT CREATED A SEVERE DEFICIENCY OF BIOTIN,
10:49AM 17 WHICH I BELIEVE TO BE A TYPE OF VITAMIN, NOT THE SORT OF
10:49AM 18 VITAMIN THAT YOU WOULD GIVE PERFECTLY HEALTHY CHILDREN EVERY
10:49AM 19 DAY, BUT A PARTICULAR VITAMIN THAT THIS DISEASE OF THE CHILD
10:49AM 20 CREATED A SEVERE DEFICIENCY OF. THE CHILD NEEDED THAT, THE
10:50AM 21 VITAMIN THAT DR. WOOD WAS TRYING TO PRESCRIBE FOR HIM OR HER.
10:50AM 22 AND THERE'S A LENGTHY DESCRIPTION OF WHAT ALL SHE WENT THROUGH
10:50AM 23 AND ALL THE PHONE CALLS THAT SHE MADE AND ALL THE PEOPLE WHO
10:50AM 24 TOLD HER THEY DIDN'T KNOW HOW TO GET IT FOR HER IN A COMPOUNDED
10:50AM 25 FORM, WHICH WAS WHAT THE CHILD NEEDED. THAT WAS IN HER

10:50AM 1 DEPOSITION.

10:50AM 2 SHE TESTIFIED THAT NOT ALL THE MCO'S PERMIT THEM TO
10:50AM 3 GET PRIOR AUTHORIZATION BY PHONE; SOME OF THEM REQUIRE THAT
10:50AM 4 THEY BE DONE BY FAX. THE PROCESS TAKES LONGER, MORE PAPERWORK
10:50AM 5 IS INVOLVED.

10:50AM 6 AND, AGAIN, THESE ARE DOCTORS WHO ARE NOT GETTING
10:50AM 7 PAID A TON OF MONEY TO TAKE CARE OF THESE CHILDREN, INCLUDING
10:50AM 8 SOME THAT HAVE CHRONIC ILLNESSES THAT ARE GOING TO REQUIRE
10:50AM 9 MEDICATIONS OF VARIOUS TYPES, MEDICAL EQUIPMENT AND SUPPLIES
10:51AM 10 OF VARIOUS TYPES. AND IT IS JUST--I DON'T KNOW WHY THEY WOULD
10:51AM 11 HAVE A MOTIVE--OTHER THAN SINCERE CONCERN ABOUT THE CHILDREN
10:51AM 12 AND ABOUT THEIR BEING ABLE TO GET MEDICATIONS, I DON'T KNOW WHY
10:51AM 13 THEY WOULD HAVE A MOTIVE TO SAY WHAT THEY HAVE TO THE COURT IF
10:51AM 14 IT WERE NOT A REAL PROBLEM FOR THEM. DEFENDANTS CAN TELL US
10:51AM 15 THE THEORY, BUT THESE PEOPLE CAN TELL US WHAT ACTUALLY HAPPENS.

10:51AM 16 DEFENDANTS CHALLENGED THEIR TESTIMONY IN THEIR
10:51AM 17 MOTION TO STRIKE. AND I'M HOPING YOU WILL LET MR. GARRIGAN
10:51AM 18 ADDRESS THAT MOTION TO STRIKE WHEN WE GET THROUGH WITH THE
10:51AM 19 OTHER MOTIONS, THE COMPETING MOTIONS.

10:51AM 20 BUT THEIR TESTIMONY PROVIDES, OVERALL, A POWERFUL
10:51AM 21 LOOK AT WHAT ALL CAN AND DOES GO WRONG. IT ALSO TELLS US THAT
10:51AM 22 WE'RE FORTUNATE TO HAVE THESE PEOPLE PROVIDING THIS CARE FOR
10:52AM 23 NOT VERY MUCH MONEY.

10:52AM 24 WE DO NOT HAVE AND CANNOT AFFORD A DYSFUNCTIONAL
10:52AM 25 PRESCRIPTION DRUG, DURABLE MEDICAL EQUIPMENT AND MEDICAL-SUPPLY

10:52AM 1 PROCESS THAT FRUSTRATES THEIR EFFORTS TO GET THE CHILDREN
10:52AM 2 WHAT THEY NEED AND COSTS THEM AND THEIR STAFF HUGE AMOUNTS OF
10:52AM 3 ADDITIONAL TIME UNNECESSARILY WITH NO BENEFIT TO THE STATE.

10:52AM 4 WE SUPPORT THE STATE IN HAVING A PREFERRED-DRUG
10:52AM 5 LIST. WE'RE NOT TRYING TO GET THAT DONE AWAY WITH. WE
10:52AM 6 KNOW IT'S NEEDED. BUT THE PROCESS FOR ITS USE HAS TO WORK
10:52AM 7 EFFECTIVELY, AS DOES THE PROCESS FOR THE CHILDREN BEING ABLE
10:52AM 8 TO GET THE MEDICAL EQUIPMENT AND SUPPLIES THAT THEY NEED AT
10:52AM 9 PHARMACIES.

10:52AM 10 THE COURT: OKAY, MS. SWANSON. THANK YOU.

10:53AM 11 MR. ECCLES, BEFORE YOU START, I THINK WE'VE BEEN
10:53AM 12 IN HERE FOR ALMOST TWO HOURS. LET'S TAKE A 15-MINUTE RECESS.

10:53AM 13 MR. ECCLES: THANK YOU, YOUR HONOR.

10:53AM 14 THE COURT: WE'LL RECESS FOR 15 MINUTES. THANK YOU.
10:53AM 15 YOU ARE EXCUSED.

10:53AM 16 [RECESS]

11:10AM 17 THE COURT: PLEASE BE SEATED.

11:10AM 18 MR. ECCLES: YOUR HONOR, I FEEL LIKE WE'VE HEARD
11:10AM 19 KIND OF A MANGLED RENDITION OF A PUNCH LINE WITHOUT ACTUALLY
11:10AM 20 HEARING THE SETUP.

11:10AM 21 I WOULD LIKE TO ASK MICHELLE LONG TO GIVE US A
11:10AM 22 QUICK MEDICAID OVERVIEW OF WHAT WE'RE ACTUALLY TALKING ABOUT
11:10AM 23 PROGRAMMATICALLY IN THIS AREA OF MEDICAID IN THE STATE. IT'S
11:10AM 24 NOT THAT MANY SLIDES, BUT I THINK IT WILL PUT A LOT OF STUFF
11:10AM 25 INTO PERSPECTIVE.

11:10AM 1 THE COURT: OKAY. THAT'S FINE.

11:11AM 2 MS. LONG: GOOD MORNING. I'M MICHELLE LONG. I'M
11:11AM 3 WITH THE HEALTH AND HUMAN SERVICES COMMISSION.

11:11AM 4 JUST A REMINDER. WHAT IS MEDICAID? IT'S A PROGRAM
11:11AM 5 FOUND AT TITLE XIX OF THE SOCIAL SECURITY ACT PROVIDING
11:11AM 6 HEALTHCARE COVERAGE TO ELIGIBLE INDIVIDUALS. SO IT'S AN
11:11AM 7 ENTITLEMENT PROGRAM FOR THOSE WHO ARE ENROLLED IN THE PROGRAM
11:11AM 8 AND ARE ENTITLED TO RECEIVE THE SERVICES. THE STATES ARE--IT'S
11:11AM 9 A VOLUNTARY PROGRAM, BUT IF A STATE CHOOSES TO PARTICIPATE, IT
11:11AM 10 MUST FOLLOW ALL OF THE FEDERAL RULES.

11:11AM 11 THE COURT: LET ME ASK YOU: ARE THESE SLIDES
11:11AM 12 ANYWHERE IN THE MOTION OR THE RESPONSE OR ANY EXHIBITS OR
11:11AM 13 ANYTHING?

11:11AM 14 MR. ECCLES: NO, YOUR HONOR, THEY'RE NOT. WE WOULD
11:11AM 15 BE HAPPY TO PROVIDE THEM.

11:11AM 16 THE COURT: CAN I GET A COPY OF THEM?

11:11AM 17 MR. ECCLES: ABSOLUTELY.

11:11AM 18 THE COURT: OKAY. THANK YOU.

11:11AM 19 MS. LONG: AND SO THIS PARTICULAR SLIDE IS PART OF
11:12AM 20 DOCKET NUMBER 894-1.

11:12AM 21 MR. ECCLES: I THINK THAT WOULD BE THE LAST TIME WE
11:12AM 22 WERE HERE.

11:12AM 23 THE COURT: OKAY. HAVE YOU ALREADY GIVEN ME THESE
11:12AM 24 SLIDES?

11:12AM 25 MS. LONG: SOME OF THEM, YES.

11:12AM 1 THE COURT: SOME OF THEM? OKAY. IF THERE'S A WAY
11:12AM 2 THAT YOU CAN E-MAIL THEM TO ME OR--

11:12AM 3 MR. ECCLES: ABSOLUTELY.

11:12AM 4 THE COURT: OKAY. THAT WOULD BE GREAT.

11:12AM 5 MR. ECCLES: WE HAVE A SINGLE HARD COPY HERE.

11:12AM 6 THE COURT: OH, YOU DO? OH, GREAT. THANK YOU.

11:12AM 7 OKAY, GO AHEAD, MS. LONG.

11:12AM 8 MS. LONG: JUST SORT OF A REMINDER. WHO ARE THE
11:12AM 9 FREW CLASS MEMBERS? THEY ARE A SUBSET OF THE LARGER MEDICAID
11:12AM 10 POPULATION AND INCLUDE CHILDREN WHO ARE UNDER THE AGE OF 21 AND
11:12AM 11 ENROLLED IN MEDICAID WHO ARE ELIGIBLE FOR EARLY AND PERIODIC
11:13AM 12 SCREENING, DIAGNOSTIC AND TREATMENT SERVICES, BUT WHO HAVE NOT
11:13AM 13 RECEIVED THE ENTIRE RANGE OF THE SERVICES TO WHICH THEY ARE
11:13AM 14 ENTITLED, EXCEPT THOSE WHO HAVE KNOWINGLY AND VOLUNTARILY
11:13AM 15 REFUSED THE SERVICES.

11:13AM 16 SO THE TOPIC OF THIS CORRECTIVE ACTION ORDER IS,
11:13AM 17 IN PART, MEDICAID OUTPATIENT DRUG BENEFITS. PRESCRIPTION-DRUG
11:13AM 18 COVERAGE IS OPTIONAL SERVICES FOR MEDICAID TO PROVIDE.
11:13AM 19 CURRENTLY ALL 50 STATES OFFER OUTPATIENT DRUG BENEFITS.

11:13AM 20 CHILDREN WHO ARE ON MEDICAID IN TEXAS ARE ABLE
11:13AM 21 TO RECEIVE AN UNLIMITED NUMBER OF PRESCRIPTIONS EACH MONTH.
11:13AM 22 THEY'RE NOT REQUIRED TO PAY COPAYS. THEY CAN BE PRESCRIBED
11:13AM 23 OVER-THE-COUNTER MEDICATIONS AND THEY CAN BE PRESCRIBED
11:13AM 24 MEDICALLY NECESSARY MEDICATIONS, WHICH INCLUDE VITAMINS
11:13AM 25 AND MINERALS.

11:14AM 1 THE COURT: HANG ON. COULD YOU GO BACK TO THAT
11:14AM 2 SLIDE? OKAY. THANK YOU.

11:14AM 3 MS. LONG: THE FEDERAL GOVERNMENT HAS REBATE
11:14AM 4 AGREEMENTS. IN 2011, TEXAS MEDICAID SPENT APPROXIMATELY
11:14AM 5 \$2.5 BILLION ON PRESCRIPTION DRUGS. THE MEDICAID ACT DOES NOT
11:14AM 6 PERMIT PAYMENT FOR PRESCRIPTION DRUGS UNLESS THE MANUFACTURER
11:14AM 7 HAS ENTERED INTO A REBATE AGREEMENT WITH THE SECRETARY OF
11:14AM 8 HEALTH AND HUMAN SERVICES. AND THAT'S REQUIRED AS PART OF
11:14AM 9 THE U.S. CODE.

11:14AM 10 WITH CERTAIN EXCEPTIONS, OUR STATE'S FORMULARY MUST
11:14AM 11 INCLUDE COVERED OUTPATIENT DRUGS OF ANY MANUFACTURER THAT HAS
11:14AM 12 ENTERED INTO THE REBATE AGREEMENT.

11:14AM 13 THE COURT: WHAT DOES THE "S" IN SFY 2011 MEAN?

11:14AM 14 MS. LONG: "STATE FISCAL YEAR," AS OPPOSED TO
11:15AM 15 "FEDERAL FISCAL YEAR."

11:15AM 16 THE COURT: OKAY. THANK YOU.

11:15AM 17 MS. LONG: AND IT RUNS FROM SEPTEMBER 1ST THROUGH
11:15AM 18 AUGUST 31ST. SO IT'S A MONTH REMOVED FROM THE FISCAL YEAR.

11:15AM 19 THE TEXAS MEDICAID PREFERRED-DRUG LIST, WHICH IS
11:15AM 20 ONE OF THE ACRONYMS THAT WE WILL SOMETIMES TOSS AROUND AS PDL,
11:15AM 21 WE IMPLEMENTED IN 2003 AS A REQUIREMENT OF OUR TEXAS LAW.

11:15AM 22 THE PROCUREMENT PROCESS WAS PUT IN PLACE TO CONTROL
11:15AM 23 ESCALATING COSTS. IT'S PART OF OUR TEXAS GOVERNMENT CODE.

11:15AM 24 THE ADOPTION OF THE MEDICAID PREFERRED-DRUG LIST IS
11:15AM 25 DONE BY THE VENDOR DRUG PROGRAM, WHICH IS PART OF HEALTH AND

11:15AM 1 HUMAN SERVICES COMMISSION.

11:15AM 2 AUTHORIZATION OF MEDICATIONS IS NOT INCLUDED--PRIOR
11:15AM 3 AUTHORIZATION IS REQUIRED FOR MEDICATIONS THAT ARE NOT INCLUDED
11:15AM 4 ON THE PREFERRED-DRUG LIST, AS EXPLAINED IN THE GOVERNMENT
11:15AM 5 CODE.

11:15AM 6 AND WE HAD TO SUBMIT A STATE PLAN FOR OUR MEDICAID
11:16AM 7 PROGRAM TO THE CENTERS FOR MEDICARE AND MEDICAID SERVICES.
11:16AM 8 THAT'S WHAT THE CMS ACRONYM IS FOR ON THIS SLIDE. THE STATE
11:16AM 9 PLAN DESCRIBED HOW WE WOULD IMPLEMENT THAT PREFERRED-DRUG LIST.
11:16AM 10 AND THEY APPROVED THAT STATE PLAN IN NOVEMBER OF 2003. THEY
11:16AM 11 ARE A FEDERAL PARTNER.

11:16AM 12 THE TEXAS MEDICAID FORMULARY COVERS THOUSANDS OF
11:16AM 13 PRESCRIPTION DRUGS AND INCLUDES BOTH BRAND-NAME AND GENERIC
11:16AM 14 DRUGS. THE DRUGS THAT ARE ON THE PREFERRED-DRUG LIST ARE
11:16AM 15 SELECTED ON THE BASIS OF CLINICAL EFFICIENCY, COST-EFFECTIVENESS
11:16AM 16 AND PROGRAM BENEFIT. A DRUG THAT IS PREFERRED DOES NOT REQUIRE
11:16AM 17 PRIOR AUTHORIZATION. NON-PREFERRED MEDICATIONS, THOSE THAT DO
11:16AM 18 REQUIRE PRIOR AUTHORIZATION, ACCOUNT FOR APPROXIMATELY 10 TO 15
11:16AM 19 PERCENT OF THE DRUGS.

11:17AM 20 THE COURT: SO IF IT'S ON THE PDL, THERE'S NO NEED
11:17AM 21 FOR A PRIOR AUTHORIZATION?

11:17AM 22 MS. LONG: CORRECT.

11:17AM 23 THE MEDICARE VENDOR DRUG PROGRAM HAS MORE THAN 4,000
11:17AM 24 PHARMACIES ACROSS THE STATE THAT ARE ENROLLED AS MEDICAID
11:17AM 25 PROVIDERS. THE PHARMACIES ARE LINKED ELECTRONICALLY WITH

11:17AM 1 A SYSTEM THAT ALLOWS FOR POINT-OF-SALE PROCESSING OF
11:17AM 2 PRESCRIPTIONS THAT ARE BEING REQUESTED. THE SYSTEM TELLS
11:17AM 3 THE PHARMACIST IN REALTIME IF THE CLIENT IS ELIGIBLE FOR
11:17AM 4 MEDICAID OR IF THEY HAVE OTHER HEALTH INSURANCE THAT NEEDS TO
11:17AM 5 BE BILLED, WHETHER A PRIOR AUTHORIZATION IS REQUIRED FOR THE
11:17AM 6 REQUESTED DRUG, WHETHER A PRESCRIPTION IS APPROVED, AND HOW
11:18AM 7 MUCH THE PHARMACIST WILL BE PAID.

11:18AM 8 THIS PARTICULAR SLIDE OUTLINES THE U.S. CODE AND THE
11:18AM 9 FEDERAL REGULATIONS THAT GOVERN THE 72-HOUR EMERGENCY SUPPLY
11:18AM 10 WITHIN THE MEDICAID PROGRAM. THE 72-HOUR EMERGENCY SUPPLY IS
11:18AM 11 ALLOWED TO BE IMPLEMENTED BY STATES IF THE PROCESS PROVIDES FOR
11:18AM 12 A RESPONSE WITHIN 24 HOURS OF A REQUEST AND IF IT PROVIDES FOR
11:18AM 13 THE DISPENSING OF A 72-HOUR SUPPLY OF THE OUTPATIENT DRUG.

11:18AM 14 THE CODE OF FEDERAL REGULATIONS ALLOWS A PARTIAL
11:18AM 15 SALE FOR CONTROLLED SUBSTANCES THAT REQUIRE A NEW PRESCRIPTION
11:18AM 16 IF THE FULL QUANTITY ISN'T PROVIDED WITHIN 72 HOURS. THIS
11:18AM 17 IS OFTEN A CONSIDERATION THAT OUR PHARMACIES HAVE TO THINK
11:18AM 18 THROUGH.

11:18AM 19 THIS SCREEN PROVIDES A SCREENSHOT OF SOME OF THE
11:19AM 20 INFORMATION THAT IS PROVIDED TO A PHARMACIST WHEN THEY ATTEMPT
11:19AM 21 TO ENTER A MEDICATION. IN THIS INSTANCE, THE REQUEST WAS
11:19AM 22 REJECTED AND THE PHARMACIST WAS PROVIDED A MESSAGE TO SEEK
11:19AM 23 PRIOR AUTHORIZATION OR TO PROVIDE A 72-HOUR EMERGENCY-
11:19AM 24 MEDICATION SUPPLY IF THE PHYSICIAN IS NOT AVAILABLE.

11:19AM 25 AND THIS NEXT SLIDE PROVIDES A SCREENSHOT OF

11:19AM 1 ACTUALLY WHAT THE PHARMACY SEES WHEN THEY ENTER INTO THAT
11:19AM 2 POINT-OF-SALE SYSTEM. SO, IN THIS INSTANCE, THEY ENTERED IN
11:19AM 3 THIS PARTICULAR MEDICATION AND IT SHOWS AT THE BOTTOM THAT THE
11:19AM 4 STATUS WAS "REJECTED." AND THERE'S A MESSAGE THAT WAS RETURNED
11:19AM 5 REMINDING THE PROVIDER TO REQUEST A 72-HOUR EMERGENCY SUPPLY
11:19AM 6 OF MEDICATION.

11:19AM 7 THE COURT: REMINDING THE PHARMACY? THIS IS FROM
11:20AM 8 THE PHARMACY?

11:20AM 9 MS. LONG: THIS IS A SCREENSHOT AT THE PHARMACY.
11:20AM 10 SO THIS IS WHAT THE PHARMACIST SEES.

11:20AM 11 THE COURT: OKAY. THIS IS WHAT THE SYSTEM IS TELLING
11:20AM 12 THE PHARMACY?

11:20AM 13 MS. LONG: CORRECT.

11:20AM 14 THE COURT: THAT "WE'RE REJECTING FILLING
11:20AM 15 CICLOPIROX." RIGHT?

11:20AM 16 MS. LONG: YES.

11:20AM 17 THE COURT: AND THAT THE PHARMACIST CAN--

11:20AM 18 MS. LONG: THAT THE PHARMACIST SHOULD HAVE THE
11:20AM 19 PRESCRIBER CONTACT THIS PHONE NUMBER AND REQUEST AUTHORIZATION
11:20AM 20 AND SHOULD SUBMIT A 72-HOUR PRESCRIPTION.

11:20AM 21 THE COURT: OKAY. NOW, I GUESS IF THE DOCTOR SEES
11:20AM 22 ON THE SCREEN THAT HE OR SHE HAS IN HIS OR HER OFFICE THERE
11:20AM 23 THAT THIS MEDICATION THAT HE WANTS TO PRESCRIBE REQUIRES
11:20AM 24 PRIOR AUTHORIZATION, THEN HE CAN DO WHAT, ASK ONLINE FOR PRIOR
11:21AM 25 AUTHORIZATION? OR DOES HE PICK UP THE PHONE AND ASK FOR THAT,

11:21AM 1 OR WHAT?

11:21AM 2 MR. ECCLES: SINCE THAT IS GETTING A LITTLE BIT INTO
11:21AM 3 AN ARGUMENT, I'LL SAY THAT THERE ARE A NUMBER OF THINGS THAT
11:21AM 4 A DOCTOR CAN ACTUALLY DO. IT'S ONE OF THE WONDERS OF THE
11:21AM 5 EPOCRATES SYSTEM THAT IF YOU HAVE A DRUG THAT BELONGS TO A
11:21AM 6 FAMILY OF DRUGS THAT ALL DO THE SAME THING AND YOU WANT TO
11:21AM 7 WRITE A PRESCRIPTION FOR, FOR INSTANCE, A BRAND-NAME DRUG,
11:21AM 8 BUT IT'S THE SAME THING GENERICALLY, AND THE GENERIC IS ON
11:21AM 9 THE PREFERRED LIST, YOU CAN JUST GO OVER AND JUST GO AHEAD AND
11:21AM 10 PRESCRIBE THAT. AS A MATTER OF FACT, IN THE DEPOSITION OF ONE
11:21AM 11 OF THE WITNESSES, ONE OF THE DOCTORS SAYS THAT HE DOES THAT ALL
11:21AM 12 THE TIME.

11:21AM 13 THE COURT: AND THAT JUST ELIMINATES THE NEED TO GET
11:21AM 14 PRIOR AUTHORIZATION?

11:21AM 15 MR. ECCLES: PRECISELY.

11:21AM 16 THE COURT: OKAY. BUT WHEN THE PATIENT IS THERE
11:21AM 17 AND THE DOCTOR IS LOOKING ON HIS SCREEN ABOUT WHAT DRUGS ARE
11:21AM 18 AVAILABLE WITHOUT PRIOR AUTHORIZATION, OR EVEN WITH, THEN IF
11:21AM 19 HE DECIDES ON A DRUG THAT REQUIRES PRIOR AUTHORIZATION, HE CAN
11:22AM 20 THEN REQUEST IT RIGHT THERE IN HIS OFFICE?

11:22AM 21 MR. ECCLES: YES.

11:22AM 22 THE COURT: AND THEN IF IT'S GIVEN, THEN WHEN THE
11:22AM 23 PATIENT GOES TO THE PHARMACY, THE PHARMACY WILL NOT DENY THE
11:22AM 24 FULL PRESCRIPTION?

11:22AM 25 MR. ECCLES: CORRECT.

11:22AM 1 THE COURT: IT'S ONLY WHEN THE PHYSICIAN EITHER
11:22AM 2 FORGETS TO GET PRIOR AUTHORIZATION--I GUESS IT WOULD ONLY BE
11:22AM 3 IN THAT CIRCUMSTANCE THAT THE PATIENT WOULD GO TO THE PHARMACY
11:22AM 4 WITH THE PRESCRIPTION FOR A DRUG THAT REQUIRES PRIOR
11:22AM 5 AUTHORIZATION AND BE TOLD NO.

11:22AM 6 MR. ECCLES: YES. HOWEVER, IN THAT CIRCUMSTANCE,
11:22AM 7 THEY WOULD STILL BE DISPENSING THE 72-HOUR UNTIL THEY HAVE TIME
11:22AM 8 TO CIRCLE BACK EITHER WITH THAT DOCTOR OR WITH THE PRIMARY-CARE
11:22AM 9 PHYSICIAN, IF IT WAS AN EMERGENCY-ROOM SITUATION, AND GO AHEAD
11:22AM 10 AND GET PRIOR AUTHORIZATION.

11:22AM 11 THE COURT: OR THE MEDICAID PATIENT COULD WAIT
11:22AM 12 AT THE PHARMACY UNTIL THE PHARMACIST CONTACTS THE DOCTOR AND
11:23AM 13 THE DOCTOR MAKES THE REQUEST AND THE AUTHORIZATION IS GIVEN?

11:23AM 14 MR. ECCLES: SURE.

11:23AM 15 THE COURT: OKAY. THANK YOU.

11:23AM 16 YES, MA'AM.

11:23AM 17 MS. LONG: SO THE NEXT SLIDE SHOWS THAT IN THIS
11:23AM 18 PARTICULAR CASE THE PHARMACY ENTERED INTO THE SYSTEM THE
11:23AM 19 INFORMATION NECESSARY TO FILL A 72-HOUR EMERGENCY PRESCRIPTION.
11:23AM 20 AND YOU CAN SEE THAT AT THE BOTTOM THE PHARMACY WAS IMMEDIATELY
11:23AM 21 INFORMED ON THIS POINT-OF-SALE SYSTEM THAT THE CLAIM WAS PAID
11:23AM 22 AND THE AMOUNT THAT THEY WOULD BE RECEIVING FOR THAT 72-HOUR
11:23AM 23 EMERGENCY SUPPLY OF MEDICATION.

11:23AM 24 THE COURT: OKAY. AND THEN FROM THAT POINT ON THE
11:23AM 25 PHARMACY WOULD THEN CONTACT THE DOCTOR AND TRY TO GET THE FULL

11:23AM 1 PRESCRIPTION FILLED?

11:23AM 2 MS. LONG: YES, SIR.

11:23AM 3 THE COURT: OKAY.

11:23AM 4 MS. LONG: AND THEN PROVIDE SOME REFERENCE SITES
11:23AM 5 FOR YOU WITH REGARD TO THE TEXAS VENDOR DRUG PROGRAM AND THE
11:23AM 6 EPOCRATES ONLINE TOOL THAT MS. SWANSON WAS REFERENCING EARLIER
11:24AM 7 AND THAT I'M SURE MR. ECCLES WILL.

11:24AM 8 THE COURT: OKAY. ALL RIGHT. THANK YOU, MS. LONG.

11:24AM 9 MS. LONG: YOU ARE WELCOME.

11:24AM 10 MR. ECCLES: THERE'S A GREAT DEAL TO TALK ABOUT,
11:24AM 11 YOUR HONOR, AND I HAVE A LOT OF BINDERS OVER HERE, SO I HOPE
11:24AM 12 YOU'LL FORGIVE ME AND GIVE ME THE LATITUDE TO MOVE BACK AND
11:24AM 13 FORTH.

11:24AM 14 THE COURT: OKAY.

11:24AM 15 MR. ECCLES: WITHOUT TRYING TO SOUND GLIB, I WISH
11:24AM 16 THAT I HAD KNOWN ABOUT A YEAR AGO THAT IT SEEMS LIKE WE'VE
11:24AM 17 KNOCKED 10 OUT OF 12 OF THE BULLETPROOF--OF THE BULLET POINTS
11:24AM 18 OF THE CORRECTIVE ACTION ORDER AT ISSUE OUT OF THE WAY. I
11:24AM 19 DON'T WANT TO BELABOR THE POINT--

11:24AM 20 THE COURT: I JUST WANTED TO SEE WHAT THERE WAS A
11:24AM 21 DISPUTE OVER.

11:24AM 22 MR. ECCLES: SURE.

11:24AM 23 THE COURT: AND SO I THINK MS. SWANSON AGREES THAT
11:25AM 24 WE'RE REALLY FOCUSING ON BULLET POINT 1 ON PAGE 4 AND BULLET
11:25AM 25 POINT 1 ON PAGE 5.

11:25AM 1 MR. ECCLES: WELL, TO THE EXTENT THAT--

11:25AM 2 THE COURT: SHE DOESN'T NECESSARILY AGREE THAT THE
11:25AM 3 STATE HAS DONE EVERYTHING IT SHOULD ON SOME OF THE OTHERS,
11:25AM 4 BUT SHE AGREES THE STATE HAS MADE AN EFFORT.

11:25AM 5 MR. ECCLES: WELL, AND TO THE EXTENT THAT WE'RE
11:25AM 6 LOOKING AT A STANDARD FOR "WHAT DOES THE STATE HAVE TO DO TO
11:25AM 7 SATISFY," IF WE'RE LOOKING NOW AND SAYING "HAS THE STATE DONE
11:25AM 8 ENOUGH," I'LL POINT THE COURT TO THE DEFENSE EXHIBIT NUMBER 5,
11:25AM 9 BECAUSE WE WANTED TO BE ABLE TO GIVE THE COURT A RUNDOWN OF
11:25AM 10 THE EVIDENCE BULLET POINT BY BULLET POINT.

11:25AM 11 THE COURT: ALL RIGHT. YOU WANT ME TO LOOK AT YOUR
11:25AM 12 EXHIBIT NUMBER 5--

11:26AM 13 MR. ECCLES: YES, YOUR HONOR.

11:26AM 14 THE COURT: --IN YOUR MOTION TO DISSOLVE THE CAO?

11:26AM 15 MR. ECCLES: YES, YOUR HONOR.

11:26AM 16 THE COURT: OKAY.

11:26AM 17 MR. ECCLES: I'LL MOVE THROUGH THIS AS QUICKLY AS
11:26AM 18 THE COURT WOULD LIKE. THE FIRST COUPLE OF POINTS, AS THE COURT
11:26AM 19 ACKNOWLEDGED, ARE REALLY JUST RECITATIONS, THEY DON'T SEEM TO
11:26AM 20 REQUIRE THE STATE TO PERFORM ANYTHING NEW.

11:27AM 21 AS WE MOVE ON TO THE THIRD BULLET POINT, REVISING
11:27AM 22 THE MESSAGE ON THE AUTOMATED DTP PROCESSING, I DON'T KNOW THAT
11:27AM 23 THERE WAS ANY SHOWING WHATSOEVER THAT THAT WAS DONE, BUT IT WAS
11:27AM 24 COMPLETED BY NOVEMBER OF 2007. YOU'VE SEEN SOME SLIDES ALREADY
11:27AM 25 INDICATING WHAT A SCREENSHOT LOOKS LIKE. BUT TO THE EXTENT

11:27AM 1 THAT THERE IS ANY CONFUSION ON THAT POINT AND WE'RE LOOKING
11:27AM 2 FOR THE EVIDENCE TO DEMONSTRATE THAT THIS WAS DONE AND DONE
11:27AM 3 TIMELY, WE GO TO THE COLUMN ON THE RIGHT, EVIDENCE SHOWING
11:27AM 4 COMPLIANCE WITH THE CAO REQUIREMENTS. YOU ARE GOING TO SEE
11:27AM 5 A NUMBER OF DECLARATIONS BY FOLKS AT HHSC. AND BACKING THOSE
11:27AM 6 UP ARE USUALLY FURTHER DOCUMENTS ILLUSTRATING EXACTLY HOW
11:27AM 7 THIS CORRECTIVE ACTION ORDER BULLET POINT WAS DEALT WITH.

11:28AM 8 FOLLOWING MORE TO THE RIGHT IS EVIDENCE SHOWING
11:28AM 9 ACTIONS BEYOND THE CORRECTIVE ACTION ORDER REQUIREMENTS.
11:28AM 10 AND WE'LL GET INTO SOME OF THOSE. BUT THIS IS JUST IN A
11:28AM 11 BELT-AND-SUSPENDERS-TYPE APPROACH.

11:28AM 12 AND A FAIR AMOUNT OF THE DISCUSSION BETWEEN COUNSEL
11:28AM 13 AT THE END OF THIS CORRECTIVE ACTION ORDER WAS THE ATTEMPT TO
11:28AM 14 DISCUSS WITH PLAINTIFFS THE IDEA THAT DEFENDANTS HAD CLEARLY
11:28AM 15 DONE EVERYTHING THAT THE CORRECTIVE ACTION ORDER REQUIRED.

11:28AM 16 WE WANTED TO DO A LITTLE BIT MORE AND SHOW IN GOOD
11:28AM 17 FAITH THAT WE REALLY DID WANT ALL THE PHARMACISTS TO HAVE AS
11:28AM 18 MUCH AND GOOD INFORMATION ABOUT ESPECIALLY THIS 72-HOUR THING.
11:28AM 19 EVEN THOUGH THAT MAKES UP ABOUT ONE PERCENT OF THE PRESCRIPTIONS,
11:28AM 20 WE STILL REALLY WERE COMMITTED TO THAT PRINCIPLE. WE DID MORE
11:28AM 21 SURVEYS THAN THE CORRECTIVE ACTION ORDER REQUIRED. THE
11:28AM 22 FOLLOW-UP ON IT--AND EVEN THOUGH THE PLAINTIFFS DID NOT AGREE
11:28AM 23 TO LET ANY FACET OF THIS CORRECTIVE ACTION ORDER GO, THOSE
11:29AM 24 MATTERS THAT WE DID SAY WE WOULD CONTINUE, WE HIRED A MARKETING
11:29AM 25 FIRM THAT DID ANOTHER SURVEY IN CONJUNCTION WITH THE UNIVERSITY

11:29AM 1 OF TEXAS PHARMACY SCHOOL. WE STILL WENT AHEAD AND DID ALL OF
11:29AM 2 THOSE THINGS ANYWAY. AND ALL OF THAT IS CONTAINED WITHIN THIS
11:29AM 3 EVIDENCE AS POINTED OUT BULLET POINT BY BULLET POINT THROUGH
11:29AM 4 THIS CORRECTIVE ACTION ORDER.

11:29AM 5 I WILL GO AHEAD AND TURN AND FOCUS ON THOSE MATTERS
11:29AM 6 THAT MS. SWANSON MADE PARTICULAR ISSUE WITH, AND THAT WAS,
11:29AM 7 LET'S SEE, DEVELOPING INTENSIVE AND TARGETED EDUCATION TO
11:29AM 8 PHARMACISTS FOR WHICH DATA SUGGESTED A LACK OF KNOWLEDGE
11:29AM 9 OF THE 72-HOUR EMERGENCY-PRESCRIPTION POLICY.

11:30AM 10 NOW, INDEED, CALLING IT "JUST A LETTER" THAT WAS
11:30AM 11 SENT TO THOSE THAT THE SURVEY IDENTIFIED, IT WAS SOMETHING LIKE
11:30AM 12 800 PHARMACIES THAT WERE IDENTIFIED AS STATISTICALLY BEING A
11:30AM 13 LITTLE BIT UNDER WHERE THEY SHOULD BE. MAYBE THEY DIDN'T QUITE
11:30AM 14 UNDERSTAND IT. THE KEY WAS--AND WE'LL GO THROUGH ALL OF THE
11:30AM 15 INFORMATION THAT WAS GIVEN TO PHARMACISTS TOUCHING ON THIS
11:30AM 16 RULE. THIS IS JUST THE TINY PIECE ON TOP, BECAUSE YOU ARE
11:30AM 17 GOING TO SEE PACKETS, NEWSLETTERS, E-MAILS, ONE-ON-ONE
11:30AM 18 TRAINING, HOTLINES, GOING TO CONFERENCES AND PRESENTATIONS.
11:30AM 19 THERE'S ALL OF THIS STUFF THAT HHSC IS PUTTING OUT THERE. BUT
11:30AM 20 WHAT DO WE DO FOR THE CORRECTIVE ACTION ORDER THAT IS TARGETED
11:30AM 21 ON THE STATISTICAL SORT OF OUTLIERS THAT MAYBE THEY DON'T KNOW
11:30AM 22 ABOUT IT? THE FIRST THING IS YOU SAW--

11:31AM 23 THE COURT: WHAT DID YOU SAY ABOUT 800 PHARMACIES?
11:31AM 24 YOU JUST SAID SOMETHING ABOUT 800 PHARMACIES.

11:31AM 25 MR. ECCLES: I BELIEVE--AND I AM LOOKING AT PAGE 9

11:31AM 1 OF EXHIBIT 2 FOR DEFENDANTS' DECLARATION OF MARABEL CASTORENO.
11:31AM 2 PARAGRAPH 25 SAYS: TRACKING THE RECEIPT OF LETTERS AND
11:31AM 3 CONFIRMATION OF DELIVERY TO THE PHARMACIES THAT WERE IDENTIFIED
11:31AM 4 TO BE TARGETED FOR INTENSIVE EDUCATION.

11:32AM 5 THEY IDENTIFIED 822 PHARMACIES THAT HAD TWO QUARTERS
11:32AM 6 OF BELOW-AVERAGE CLAIMS AND MONITORED THEM TO DETERMINE WHETHER
11:32AM 7 THEIR NUMBERS WERE RELIABLY CLASSIFIED AS BELOW AVERAGE.

11:32AM 8 ONCE THERE WAS THIS TREND OF A COUPLE OF QUARTERS
11:32AM 9 WHERE THOSE NUMBERS REALLY DIDN'T SEEM TO JIBE, THEN THEY WENT
11:32AM 10 AHEAD AND THEY SENT THESE CERTIFIED LETTERS TO THE PERSON WHO
11:32AM 11 IS IN CHARGE OF THE PHARMACISTS AT THESE PHARMACIES.

11:32AM 12 IF NOBODY SIGNED FOR THEM, IF NOBODY GOT THESE
11:32AM 13 LETTERS, THEN THERE WAS A PHONE CALL THAT WAS MADE. IF THEY
11:32AM 14 COULDN'T GET IN TOUCH WITH A PHONE CALL IN ORDER TO EXPLAIN
11:32AM 15 THE IMPORTANCE OF THIS RULE, THEN SOMEBODY LIKE MS. DISNEY
11:32AM 16 WOULD HAVE TO DRIVE OUT THERE, FIND THE PERSON IN CHARGE,
11:32AM 17 AND SAY, "LOOK, WE NEED TO GET YOU TRAINED UP ON THIS RULE."

11:33AM 18 NOW PUT THAT IN CONTEXT WITH ALL OF THE OTHER STUFF
11:33AM 19 THAT'S GOING ON--

11:33AM 20 THE COURT: THESE ARE 822 PHARMACIES WITH NO
11:33AM 21 CONFIRMATION, WHO DID NOT BOTHER TO CONFIRM TO YOU THAT
11:33AM 22 THEY HAD RECEIVED THE LETTER?

11:33AM 23 MR. ECCLES: NO, ACTUALLY, OF THE 822, ONLY 45 WERE
11:33AM 24 NOT REACHED BY THE CERTIFIED MAIL.

11:33AM 25 THE COURT: SO OF THE 822--IS THAT THE NUMBER THAT

11:33AM 1 THE STATE CALCULATES WERE DISPENSING MEDICAID PRESCRIPTIONS BUT
11:33AM 2 AN INSUFFICIENT NUMBER OF 72-HOUR SUPPLIES?

11:33AM 3 MR. ECCLES: WELL, I WANT TO BE CAREFUL ABOUT
11:33AM 4 CALLING IT "INSUFFICIENT." IT WAS REALLY JUST--IN ACCORDANCE
11:33AM 5 WITH AVERAGES, SHOULD A PHARMACY OF THAT SIZE BE DISPENSING
11:33AM 6 THESE EMERGENCY PRESCRIPTIONS? AND THAT'S WHY THE LETTER THAT
11:33AM 7 MS. SWANSON SHOWED YOU--

11:34AM 8 THE COURT: OKAY. BUT YOU CAME UP WITH 822.
11:34AM 9 MS. SWANSON MENTIONED THAT 2,000 PHARMACIES WERE NOT DISPENSING
11:34AM 10 72-HOUR SUPPLIES. OR AT LEAST NOT ENOUGH.

11:34AM 11 MR. ECCLES: ACTUALLY, I DON'T--AND, AGAIN, WITH THE
11:34AM 12 "NOT ENOUGH," YOU CAN'T JUST LOOK AT A PHARMACY'S DISPENSING
11:34AM 13 AND SAY, "YOU DIDN'T DISPENSE ANY EMERGENCY 72-HOUR
11:34AM 14 PRESCRIPTIONS. YOU'RE WRONG. YOU'RE BREAKING THE LAW."

11:34AM 15 THE COURT: I UNDERSTAND. I UNDERSTAND. IT'S JUST
11:34AM 16 A LOWER-THAN-EXPECTED PERCENTAGE.

11:34AM 17 MR. ECCLES: THAT WOULD BE WHAT WOULD BE BELOW
11:34AM 18 AVERAGE.

11:34AM 19 THE COURT: OKAY. BUT HER NUMBER WAS 2,000
11:34AM 20 PHARMACIES. IS YOUR NUMBER 822?

11:34AM 21 MR. ECCLES: FROM THE FIRST SURVEY, I BELIEVE, 822
11:34AM 22 OF THE INITIAL STUDY WERE DETERMINED TO BE--LET ME GET THE
11:34AM 23 EXACT LANGUAGE--"FOLLOWING THIS DECLARATION, BASED ON THE
11:35AM 24 FIRST ANALYSIS, DEFENDANT INITIATED EDUCATION EFFORTS TARGETED
11:35AM 25 AT HIGH-VOLUME PHARMACIES WITH 1) NO 72-HOUR EMERGENCY-

11:35AM 1 PRESCRIPTION CLAIMS; AND, 2) BELOW-AVERAGE NUMBERS OF 72-HOUR
11:35AM 2 PRESCRIPTION CLAIMS."

11:35AM 3 BECAUSE THE FIRST STUDY HAD BROKEN OUT RESULTS BY
11:35AM 4 QUARTER, WE TARGETED THOSE PHARMACIES WITH THREE OR MORE
11:35AM 5 QUARTERS OF BELOW-AVERAGE NUMBERS OF CLAIMS, INCLUDING
11:35AM 6 PHARMACIES WITH NO SUCH CLAIMS. THEN THAT NUMBER WAS 822
11:35AM 7 PHARMACIES THAT WERE TARGETED FOR FURTHER EDUCATIONAL EFFORTS
11:35AM 8 BEYOND--AND WE CAN GO THROUGH THE LIST OF STUFF.

11:35AM 9 ALL PHARMACISTS WERE MAILED PACKETS FROM THE STATE
11:35AM 10 BOARD OF PHARMACY, ALL 71,982 PHARMACISTS--AND I BELIEVE IT
11:35AM 11 WENT TO THEIR HOMES, SO NOT EVEN TO THEIR BUSINESSES--IN JULY
11:36AM 12 OF 2009.

11:36AM 13 THE COURT: WELL, HOW DID YOU COME UP WITH 822 AND
11:36AM 14 MS. SWANSON SAYS THERE ARE 2,000? THAT'S A BIG DIFFERENCE.
11:36AM 15 DID YOU APPLY DIFFERENT STANDARDS FOR DETERMINING WHETHER THEIR
11:36AM 16 72-HOUR PRESCRIPTION SUPPLY--

11:36AM 17 MR. ECCLES: I'M LOOKING AT THE SECOND ANALYSIS.
11:36AM 18 THIS WOULD BE PLAINTIFFS' EXHIBIT 35. THE SECOND ANALYSIS OF
11:36AM 19 HISTORY FOR 72-HOUR EMERGENCY-SUPPLY CLAIMS. THIS WOULD HAVE
11:36AM 20 BEEN FILED WITH THE COURT. THIS WOULD BE THE SECOND REQUIRED
11:36AM 21 ANALYSIS. I'M GOING TO, LET'S SEE--PAGE 6 OUT OF 10 OF THAT
11:37AM 22 EXHIBIT SHOWS THAT THE TOTAL NUMBER OF PHARMACIES WITH NO
11:37AM 23 72-HOUR EMERGENCY-PRESCRIPTION CLAIMS DECREASED FROM 3,465
11:37AM 24 IN THE PRE-TEST PERIOD, ONE QUARTER, TO 2,206 IN THE FOURTH
11:37AM 25 QUARTER, IN THIS SECOND ANALYSIS.

11:37AM 1 THE COURT: OKAY. BUT ARE YOU SAYING THAT CURRENTLY
11:37AM 2 THERE ARE--THESE ANALYSES WERE COMPLETED, WHAT--THE SECOND ONE
11:37AM 3 WAS COMPLETED IN EARLY 2012. RIGHT?

11:37AM 4 MR. ECCLES: YES.

11:37AM 5 THE COURT: ARE YOU SAYING CURRENTLY YOU'VE
11:37AM 6 IDENTIFIED 822 PHARMACIES THAT APPEAR TO BE FILLING A
11:37AM 7 BELOW-AVERAGE NUMBER OF 72-HOUR SUPPLIES OF DRUGS?

11:37AM 8 MR. ECCLES: AND I APOLOGIZE. I KNOW THAT THIS IS
11:38AM 9 VERY CONFUSING. I'M CONFUSING MYSELF AS I SAY IT. THE FIRST
11:38AM 10 SURVEY--YOU'LL RECALL THERE WERE TWO SURVEYS.

11:38AM 11 THE COURT: YES.

11:38AM 12 MR. ECCLES: ACTUALLY, WE DID, I THINK, FOUR, MAYBE
11:38AM 13 FIVE. BUT THE FIRST SURVEY'S RESULTS, IN LOOKING AT THOSE THAT
11:38AM 14 WERE HIGH-VOLUME PHARMACIES DISPENSING BELOW AVERAGE, TRYING
11:38AM 15 TO FIND THAT SORT OF SWEETSPOT OF WHO STATISTICALLY MAY NOT
11:38AM 16 BE UNDERSTANDING THE 72-HOUR RULE, THAT YIELDED 822 PHARMACIES
11:38AM 17 THAT WERE TARGETED FOR THE ADDITIONAL EDUCATION.

11:38AM 18 THE 2,000 NUMBER APPEARS TO BE AFTER THE SECOND
11:38AM 19 SURVEY THERE WERE 2286 PHARMACIES IN THE FOURTH QUARTER OF
11:38AM 20 THE SECOND ANALYSIS THAT DISPENSED NO 72-HOUR EMERGENCY
11:38AM 21 PRESCRIPTIONS. THAT DOESN'T MEAN THAT THERE'S ANYTHING
11:38AM 22 WRONG WITH THAT, BUT IT WAS JUST TO NOTE THAT THE NUMBER OF
11:39AM 23 PHARMACIES THAT DISPENSED NO 72-HOUR EMERGENCY PRESCRIPTIONS
11:39AM 24 HAD DROPPED FROM 3,400 TO 2,200 PHARMACIES IN ONE QUARTER.

11:39AM 25 THE COURT: IS THAT WHERE YOU GOT YOUR 2,000 NUMBER,

11:39AM 1 MS. SWANSON?

11:39AM 2 MS. SWANSON: YES, YOUR HONOR, THAT'S WHERE WE GOT
11:39AM 3 IT. I THINK THEY PICKED 822 THAT WERE THE WORST OF THE WORST
11:39AM 4 AND WERE FILLING LOTS OF PRESCRIPTIONS FOR DRUGS THAT NEEDED
11:39AM 5 PRIOR AUTHORIZATIONS, OR, RATHER, NOT FILLING THEM. BUT, YES,
11:39AM 6 THAT'S WHERE I GOT THE 2,000 NUMBER.

11:39AM 7 THE COURT: OKAY. AND THAT WAS THE FOURTH QUARTER
11:39AM 8 OF 20--WHAT?

11:39AM 9 MS. SWANSON: IT WAS THE FOURTH QUARTER OF STATE
11:39AM 10 FISCAL YEAR 2011. AND I MIGHT ADD THAT'S 2,286 OUT OF 4,020
11:39AM 11 PHARMACIES.

11:39AM 12 THE COURT: OKAY.

11:40AM 13 MR. ECCLES: HOWEVER, IN A QUARTER, WHEN WE'RE
11:40AM 14 TALKING ABOUT ONE PERCENT OF THE PRESCRIPTIONS WRITTEN, THAT
11:40AM 15 IS HARDLY A STATISTICAL IMPOSSIBILITY.

11:40AM 16 THE COURT: SO DURING THAT PARTICULAR QUARTER, 2286
11:40AM 17 OUT OF 4,000 DIDN'T DISPENSE ANY 72-HOUR SUPPLIES?

11:40AM 18 MR. ECCLES: I BELIEVE THAT IS WHAT THE SECOND
11:40AM 19 SURVEY SHOWED.

11:40AM 20 THE COURT: IS THAT SO ODD THAT IT WOULD CLEARLY
11:40AM 21 INDICATE THEY DON'T UNDERSTAND THE SYSTEM AND THAT THEY DON'T
11:40AM 22 UNDERSTAND THEY CAN SUPPLY 72 HOURS' WORTH OF MEDICATIONS?

11:40AM 23 MR. ECCLES: I DON'T THINK THAT IT DOES. AS A
11:40AM 24 MATTER OF FACT, I HADN'T REALLY PICKED UP ON THAT SURVEY THAT
11:41AM 25 MS. SWANSON SHOWED THAT DEMONSTRATED THAT APPARENTLY 92 PERCENT

11:41AM 1 OF PHARMACISTS AT THAT TIME UNDERSTOOD THE 72-HOUR RULE, BUT--

11:41AM 2 THE COURT: 92 PERCENT MISUNDERSTOOD?

11:41AM 3 MR. ECCLES: NO, DID UNDERSTAND IT. THAT'S WHAT

11:41AM 4 THAT SURVEY QUESTION SHOWED.

11:41AM 5 THE COURT: OKAY. WELL, NEVERTHELESS, YOU

11:41AM 6 IDENTIFIED 822 PHARMACIES THAT HAD FILLED EITHER NO 72-HOUR

11:41AM 7 PRESCRIPTIONS OR BELOW THE EXPECTED PERCENTAGE OF 72-HOUR

11:41AM 8 PRESCRIPTIONS?

11:41AM 9 MR. ECCLES: IN THE CONTEXT OF SHOWING A PATTERN OF

11:41AM 10 THE SAME PHARMACY HAVING NO OR A LOW NUMBER. AND THIS IS WHERE

11:41AM 11 ESPECIALLY A QUARTER-BY-QUARTER ANALYSIS OF GROSS NUMBERS--

11:41AM 12 IT DOESN'T MEAN THAT THE 3,465 INCLUDED THAT 2,286 THAT NEXT

11:42AM 13 MONTH, IT'S JUST THAT PHARMACIES ARE FLUCTUATING IN WHETHER

11:42AM 14 THEY HAVE ANY 72-HOUR PRESCRIPTION--

11:42AM 15 THE COURT: OKAY. SO, BASED ON THIS 822, I THINK

11:42AM 16 YOU ARE ABOUT TO TELL ME WHAT THE STATE DID TO ADDRESS THE 822

11:42AM 17 PHARMACIES.

11:42AM 18 MR. ECCLES: WELL, FOR THE 822, THERE WAS A

11:42AM 19 CERTIFIED LETTER THAT YOU SAW THAT WENT TO THE PERSON IN CHARGE

11:42AM 20 OF THE PHARMACY, THE HEAD PHARMACIST, TO MAKE SURE THAT THEY

11:42AM 21 REALLY, REALLY KNEW THAT DESPITE THE PACKET OF INFORMATION, THE

11:42AM 22 SCREENSHOTS, THE INFORMATION THAT HAD BEEN DISPENSED DIRECTLY

11:42AM 23 TO ALL PHARMACISTS AS WELL AS TO THE PHARMACIES THEMSELVES,

11:42AM 24 THAT DESPITE THE NEWSLETTERS, THE PRESENTATIONS, THE ONLINE

11:42AM 25 TRAINING, DESPITE ALL OF THAT, THESE 822--THOSE PHARMACIES THAT

11:43AM 1 MIGHT HAVE BEEN BELOW AND WERE SHOWING A PATTERN OF BEING BELOW
11:43AM 2 OVER THREE QUARTERS WERE SENT THIS LETTER SAYING, "THIS MAY BE
11:43AM 3 A PROBLEM FOR YOU. THIS IS REALLY IMPORTANT. THIS IS STATE
11:43AM 4 LAW, THIS IS FEDERAL LAW. HERE ARE SOME RESOURCES FOR YOU TO
11:43AM 5 CONTACT. BUT YOU NEED TO GET ONBOARD WITH THIS IF THIS IS A
11:43AM 6 PROBLEM."

11:43AM 7 OUT OF THE 822, IT LOOKS LIKE THE VAST MAJORITY OF
11:43AM 8 THOSE DID ACTUALLY GET THAT LETTER. AND I BELIEVE THERE WERE,
11:43AM 9 LET'S SEE, 45 THAT WERE NOT REACHED BY THE CERTIFIED MAIL. SO
11:43AM 10 THERE WERE EFFORTS TO REACH THEM BY PHONE CALLS OR IN-PERSON
11:43AM 11 VISITS. 12 WERE VISITED, 31 WERE INFORMED BY PHONE, AND ONE
11:43AM 12 PHARMACY HAD CLOSED.

11:43AM 13 THE COURT: ALL RIGHT. NOW, WHERE ARE YOU READING
11:43AM 14 THIS?

11:43AM 15 MR. ECCLES: THIS IS OUT OF PARAGRAPH 25 OF
11:43AM 16 DEFENDANTS' EXHIBIT 2.

11:43AM 17 THE COURT: OKAY. WE'RE BACK ON 2? OKAY. AND,
11:44AM 18 AGAIN, THIS IS THE LETTER THAT IS EXHIBIT 1 OF THE STATE'S
11:44AM 19 RESPONSE TO THE PLAINTIFFS' MOTION?

11:44AM 20 MR. ECCLES: YES. AND I THINK IT BEGINS AT, LIKE,
11:44AM 21 PAGE 106 OR 108.

11:44AM 22 THE COURT: OKAY. IS IT ANYWHERE IN YOUR MOTION?
11:44AM 23 IS IT AN EXHIBIT TO YOUR MOTION?

11:44AM 24 MR. ECCLES: I THINK THAT IS FROM OUR MOTION.

11:44AM 25 THE COURT: WELL, IT WAS IDENTIFIED BY MS. SWANSON

11:44AM 1 AS EXHIBIT 1 OF YOUR RESPONSE TO HER MOTION. I GUESS MY
11:44AM 2 QUESTION IS: IS IT ANYWHERE IN THIS RING BINDER THAT YOU GAVE
11:44AM 3 ME THAT IS YOUR MOTION? SO I CAN GO TO IT.

11:44AM 4 MR. ECCLES: WELL, OUR RESPONSE TO HER MOTION IS
11:44AM 5 ALSO OUR MOTION.

11:44AM 6 THE COURT: OH, THAT'S TRUE, THAT'S TRUE. OKAY.
11:44AM 7 WELL, THEN, IT SHOULD BE RIGHT HERE.

11:45AM 8 OKAY. I'M LOOKING AT EXHIBIT 1. THE REASON I'M
11:45AM 9 TRYING TO NAIL THIS DOWN IS, WHEN ALL OF YOU LEAVE TODAY, THEN
11:45AM 10 MY LAW CLERK AND I HAVE THE TASK OF GOING THROUGH THIS STACK
11:45AM 11 OF FILINGS AND FINDING THINGS.

11:45AM 12 AND SO I'M LOOKING AT EXHIBIT 1 OF THE DEFENDANTS'
11:45AM 13 RULE 65(B) (5) MOTION TO DISSOLVE THE CORRECTIVE ACTION ORDER
11:45AM 14 AND DEFENDANTS' RESPONSE IN OPPOSITION TO THE PLAINTIFFS'
11:45AM 15 MOTION
11:45AM 16 TO ENFORCE THE CORRECTIVE ACTION ORDER. SO I'M LOOKING FOR THE
11:46AM 17 LETTER THAT MS. SWANSON PUT ON THE SCREEN EARLIER. AND EXHIBIT
11:46AM 18 1 IS QUITE A FEW PAGES. IT LOOKS LIKE EXHIBIT 1 ITSELF IS
11:46AM 19 BROKEN DOWN INTO EXHIBITS THAT ARE BY LETTERS. SO IS IT
11:46AM 20 EXHIBIT 1-J OR L OR--

11:46AM 21 MR. ECCLES: I'VE TENDERED THIS TO MS. SWANSON.
11:46AM 22 I APOLOGIZE FOR HAVING AN UNFORTUNATE ORGANIZATION SCHEME.

11:46AM 23 THE COURT: IS IT THE MAY 29TH? OKAY. I THINK
11:46AM 24 I'VE FOUND IT. OKAY. I DID FIND IT HERE. I'LL TAB THAT.

11:46AM 25 MR. ECCLES: EXHIBIT 1 IS A COMPILATION OF MATERIALS

11:46AM 1 TAKEN FROM QUARTERLY REPORTS THAT WERE FILED OVER THE YEARS,
11:46AM 2 AND IT'S QUITE A LOT OF INFORMATION.

11:46AM 3 THE COURT: YES. OKAY.

11:47AM 4 SO HERE IS THE FOUR-PAGE LETTER DATED MAY 29TH,
11:47AM 5 2009, THAT WENT OUT TO ALL 822 PHARMACIES, IS THAT CORRECT,
11:47AM 6 MR. ECCLES?

11:47AM 7 MR. ECCLES: THAT IS CORRECT.

11:47AM 8 THE COURT: OKAY. AND I WENT OVER THAT WHEN
11:47AM 9 MS. SWANSON PUT IT ON THE SCREEN. IT DOES, INDEED, TELL THEM
11:47AM 10 THAT THESE PHARMACIES ARE IN A UNIQUE POSITION TO ASSIST THESE
11:47AM 11 CLIENTS, OR PATIENTS, WITH ACCESS TO PHARMACY BENEFITS BY
11:47AM 12 DISPENSING A 72-HOUR EMERGENCY SUPPLY. IT'S RIGHT THERE IN
11:47AM 13 THE FIRST PARAGRAPH.

11:47AM 14 AND IT INFORMS THE PHARMACY THAT IT HAS BEEN
11:47AM 15 IDENTIFIED AS A PHARMACY THAT HAS FILLED A RELATIVELY LOW
11:48AM 16 NUMBER OF 72-HOUR EMERGENCY-PRESCRIPTION SUPPLIES. OKAY.
11:48AM 17 SO THAT'S ONE THING THE STATE HAS DONE. OKAY.

11:48AM 18 MR. ECCLES: WELL, AND THE TARGETED--THE MORE
11:48AM 19 INTENSE ASPECT IS WITHIN THE CONTEXT OF ALL OF THE THINGS--
11:48AM 20 ALL OF THE COMMUNICATIONS WITH THE PHARMACISTS AND PHARMACIES
11:48AM 21 REGARDING A NUMBER OF THINGS, BUT SPECIFICALLY THE 72-HOUR
11:48AM 22 RULE. AND THAT'S WHERE WE GET INTO--

11:48AM 23 THE COURT: YOU ARE SAYING THIS MAY 29TH, 2009,
11:48AM 24 LETTER IS TARGETED UNDER THE CORRECTIVE ACTION ORDER BECAUSE
11:48AM 25 YOU NARROWED IT DOWN TO THE PHARMACIES THAT APPEARED TO BE

11:49AM 1 FILLING A LOW NUMBER OF 72-HOUR PRESCRIPTION SUPPLIES.

11:49AM 2 MS. SWANSON CONTENDS THAT'S NOT, QUOTE, TARGETING
11:49AM 3 BECAUSE YOU SENT THE LETTER TO ALL 822; YOU SHOULD HAVE GONE
11:49AM 4 DEEPER INTO THEIR OPERATIONS TO SEE WHAT IT IS THEY'RE MISSING.
11:49AM 5 HOW DO YOU RESPOND TO THAT? I THINK THAT'S WHAT SHE SAID.

11:49AM 6 MR. ECCLES: I THINK THAT IS WHAT SHE SAID. THE
11:49AM 7 POINT OF THE ANALYSIS WAS TO DETERMINE--NOT TO GO PHARMACY BY
11:49AM 8 PHARMACY, BUT TO SEE IF THERE WERE THOSE THAT MIGHT BE FALLING
11:49AM 9 BELOW THE AVERAGE THAT PERHAPS SHOULD NOT BE, AND THEN TO
11:49AM 10 TARGET THOSE. AND THAT'S EXACTLY WHAT WE DID, LITERALLY.
11:49AM 11 WE DID A SURVEY, MADE A DETERMINATION AS TO WHICH PHARMACIES
11:49AM 12 WERE SHOWING A TREND OF HAVING LOWER-THAN-EXPECTED AMOUNTS OF
11:50AM 13 72-HOUR, AND THEN TARGETED THOSE--I MEAN, THAT'S WHAT A TARGET
11:50AM 14 IS, YOU'RE TAKING A BIG GROUP AND YOU'RE FOCUSING IN ON A
11:50AM 15 SUBSET--AND THEN TO THOSE, IN ADDITION TO THE BROAD PANOPLY OF
11:50AM 16 COMMUNICATIONS THEY ALL HAD, WHICH IS DETAILED HERE, AND IF WE
11:50AM 17 LOOK AT EXHIBIT 5, ALL OF THE OTHER COMMUNICATIONS THAT WERE
11:50AM 18 GOING OUT JUST ON THE 72-HOUR RULE, BUT JUST THOSE 822 GOT THE
11:50AM 19 TARGETED COMMUNICATION TRYING TO SEE IF, "OKAY, MAYBE THEY'RE
11:50AM 20 STILL NOT GETTING ALL OF THIS. SO LET'S GIVE THEM A LITTLE BIT
11:50AM 21 MORE."

11:50AM 22 THE COURT: OKAY.

11:50AM 23 MR. ECCLES: AND TO BE ABSOLUTELY CERTAIN THAT
11:50AM 24 THOSE 822 GOT THE COMMUNICATION, IF THEY DIDN'T SIGN FOR IT
11:50AM 25 PERSONALLY, WE'RE ON THE PHONE WITH THEM OR WE'RE SENDING A

11:50AM 1 PHARMACIST OUT TO THEM TO MAKE CERTAIN THAT THEY ALL GET THE
11:50AM 2 MESSAGE.

11:51AM 3 THE COURT: OKAY.

11:51AM 4 MR. ECCLES: TARGETED, YES.

11:51AM 5 THE COURT: OKAY.

11:51AM 6 NOW LOOKING AT YOUR EXHIBIT 5, PAGE 4, WHICH QUOTES
11:51AM 7 THE CAO LANGUAGE VERBATIM ABOUT PROVIDING INTENSIVE, TARGETED
11:51AM 8 EDUCATIONAL EFFORTS TO PHARMACIES FOR WHICH THE DATA SUGGESTS
11:51AM 9 A LACK OF KNOWLEDGE OF THE 72-HOUR EMERGENCY-PRESCRIPTIONS
11:51AM 10 POLICY--

11:51AM 11 MR. ECCLES: AND THEN WE CONTINUE: "IN ADDITION,
11:51AM 12 DEFENDANTS WILL CONTINUE THEIR EDUCATIONAL EFFORTS" AND,
11:51AM 13 WITH RESPECT, "ALL MEDICAID PHARMACIES USING MEANS SUCH AS"--

11:51AM 14 THE COURT: WHERE IS THE LETTER, THOUGH, THE MAY
11:51AM 15 29TH LETTER? IN COLUMN 3? IS IT LISTED IN COLUMN 3?

11:51AM 16 MR. ECCLES: IT'S PART OF EXHIBIT 1. AND, AGAIN,
11:51AM 17 THAT IS--THAT'S BAD ON ME FOR NOT--IT'S JUST THE DOWNSIDE OF
11:51AM 18 HAVING, UNFORTUNATELY, A SEALED FILING. I CAN'T REFER YOU
11:52AM 19 TO A SPECIFIC PAGE IN THE FILING, CONSIDERING THE VOLUME OF
11:52AM 20 EVERYTHING. PERHAPS I CAN GO BACK AND--

11:52AM 21 THE COURT: WELL, THE REFERENCE IN YOUR COLUMN 3 ON
11:52AM 22 PAGE 4 OF YOUR EXHIBIT 5--

11:52AM 23 MR. ECCLES: YES, SIR.

11:52AM 24 THE COURT: --REFERS TO "SEE EXHIBIT 1." AND IT
11:52AM 25 REFERS TO THE WEB SITE, NEWSLETTERS, E-MAIL, BANNER MESSAGES,

11:52AM 1 MEDICAID BULLETINS, TRAINING MODULES. SO YOU DIDN'T REALLY
11:52AM 2 LIST THIS LETTER, THIS MAY 29TH, 2009, LETTER.

11:52AM 3 MR. ECCLES: THAT IS ACTUALLY PART OF THE CONTINUING
11:52AM 4 EDUCATIONAL EFFORTS. IF WE LOOK BACK ON THE SECOND COLUMN,
11:52AM 5 ABOVE THAT IS LISTED THE DECLARATION OF MARABEL CASTORENO.
11:52AM 6 AND THAT'S THE REFERENCE TO THE LETTER.

11:52AM 7 THE COURT: TO THE LETTER?

11:52AM 8 MR. ECCLES: YES.

11:52AM 9 THE COURT: OKAY. ALL RIGHT.

11:53AM 10 MR. ECCLES: FURTHER EVIDENCE OF THE COMMUNICATIONS
11:53AM 11 IS INCLUDED IN THE DECLARATION OF LORETTA DISNEY AT PAGE 3 OF
11:53AM 12 4, AND THAT'S DEFENDANTS' EXHIBIT 11.

11:53AM 13 AND THE ABOVE-AND-BEYOND STUFF IS ALSO INCLUDED IN
11:53AM 14 MS. CASTORENO'S DECLARATION, AND THAT'S SHOWN IN EXHIBIT 5.

11:53AM 15 NOW I WANT TO GO TO THE SECOND POINT. "BY JANUARY
11:53AM 16 OF 2008, DEFENDANTS WILL TRAIN STAFF AT THEIR OMBUDSMAN'S
11:54AM 17 OFFICE ABOUT EMERGENCY-PRESCRIPTION STANDARDS."

11:54AM 18 FIRST BULLET POINT. THAT WOULD BE ON PAGE 6 OF
11:54AM 19 DEFENDANTS' EXHIBIT 5. FIRST OF ALL, THAT WAS CERTAINLY
11:54AM 20 COMPLETED. THE THING IS, IT'S BY JANUARY OF 2008. NOW, WHEN
11:54AM 21 WE'RE TALKING ABOUT WHAT'S HAPPENED RECENTLY WHEN MANAGED
11:55AM 22 CARE ALSO WAS ENTRUSTED WITH HAVING PRESCRIPTION DRUGS BEING
11:55AM 23 DISPENSED THROUGH THE MANAGED-CARE ORGANIZATION, THAT'S--I HATE
11:55AM 24 TO BE, AGAIN, GLIB ABOUT THIS, BUT THAT'S ABOVE AND BEYOND THE
11:55AM 25 TERMS OF THIS CORRECTIVE ACTION ORDER. THE "BY JANUARY OF 2008,

11:55AM 1 THE DEFENDANTS WILL TRAIN THEIR STAFF IN THE OMBUDSMAN'S OFFICE"
11:55AM 2 WAS ACTUALLY COMPLETED IN SEPTEMBER OF 2007, AND WE LIST
11:55AM 3 THE EXHIBITS WHERE THAT IS DEMONSTRATED IN DEFENDANTS' 60(B)
11:55AM 4 MOTION. BUT THERE IS FURTHER ACTIVITY ON THIS.

11:55AM 5 WHEN THE OMBUDSMAN'S OFFICE THEN HAD TO DEAL WITH
11:55AM 6 MANAGED CARE DISPENSING MEDICAID DRUGS, IT DID RETRAIN. ALL
11:55AM 7 OF THOSE EXHIBITS OF THE NEW TRAINING OF THE OMBUDSMAN'S OFFICE
11:55AM 8 ARE ALSO IN THE DEFENDANTS' EXHIBITS. AND ONE OF THOSE ASPECTS
11:56AM 9 OF TRAINING IS: WHAT DO YOU DO WITH A PERSON WHO IS IN A
11:56AM 10 MANAGED-CARE ORGANIZATION WHO CALLS IN AND SAYS, "I NEED HELP
11:56AM 11 GETTING MY PRESCRIPTION FILLED"? WELL, WHAT STEPS DO YOU
11:56AM 12 TAKE IMMEDIATELY TO ADDRESS THE CLASS MEMBERS' PROBLEMS
11:56AM 13 WHEN PHARMACIES DO NOT PROVIDE EMERGENCY MEDICINES? THE
11:56AM 14 MANAGED-CARE ORGANIZATION IS IN A POSITION TO DEAL WITH IT
11:56AM 15 IMMEDIATELY. VENDOR DRUG IS NO LONGER THE KEY PERSON OR THE
11:56AM 16 KEY ENTITY THAT IS DEALING WITH THESE DRUGS. SO, YES, THE
11:56AM 17 FIRST REACTION TO, "I'M HAVING DIFFICULTY GETTING A PHARMACY
11:56AM 18 TO FILL MY MANAGED-CARE PRESCRIPTION," IS, "HAVE YOU TALKED TO
11:56AM 19 YOUR MANAGED-CARE ORGANIZATION ABOUT THIS YET?" IF THE ANSWER
11:56AM 20 IS YES, YOU CAN LOOK AT THE TRAINING. THEN THE OMBUDSMAN'S
11:56AM 21 OFFICE DOES CONTACT THE PHARMACY AND SPRINGS INTO ACTION.
11:56AM 22 IT'S NOT A MATTER OF, "WELL, YOU ARE ON YOUR OWN NOW." IT
11:57AM 23 IS A CHANGE.

11:57AM 24 AND WAS IT A SEAMLESS PROCESS MOVING VENDOR DRUGS
11:57AM 25 FROM CENTRALIZED AND STATE CONTROL OUT TO THE MANAGED-CARE

11:57AM 1 ORGANIZATIONS? OF COURSE NOT. BUT THE THOUGHT THAT SINCE
11:57AM 2 THERE WAS A HIGHER VOLUME OF CALLS BETWEEN MARCH AND AUGUST
11:57AM 3 OF 2012, WHEN THE EVIDENCE ALSO SUGGESTS THAT THEY'RE NOW BACK
11:57AM 4 DOWN TO A NORMAL CALL VOLUME, IT'S LUDICROUS TO SAY THAT WE
11:57AM 5 VIOLATED THE CORRECTIVE ACTION ORDER BY EVER CHANGING HOW WE
11:57AM 6 DO THINGS. AND THIS IS NOT A MATTER OF "PLEASE EXCUSE OUR
11:57AM 7 BEHAVIOR." WE ACTUALLY FOLLOWED THE CORRECTIVE ACTION ORDER--

11:57AM 8 THE COURT: MAYBE I MISSED IT, BUT I DON'T THINK I
11:57AM 9 HEARD MS. SWANSON CRITICIZE YOU FOR MAKING THE CHANGE TO--ARE
11:57AM 10 YOU TALKING ABOUT HMO'S?

11:57AM 11 MR. ECCLES: YES, MANAGED-CARE ORGANIZATIONS
11:57AM 12 HANDLING PHARMACEUTICAL BENEFITS.

11:57AM 13 THE COURT: I THINK SHE WAS SAYING THAT IT DOES ADD
11:58AM 14 ANOTHER LAYER--

11:58AM 15 MR. ECCLES: SURE.

11:58AM 16 THE COURT: --OF PEOPLE WHO HAVE TO APPROVE THESE
11:58AM 17 DRUGS THAT REQUIRE PRIOR AUTHORIZATION. IS THAT RIGHT?

11:58AM 18 MR. ECCLES: I'M NOT ACTUALLY--

11:58AM 19 MS. SWANSON: YOUR HONOR, IT HAS LED TO INCREASED
11:58AM 20 PROBLEMS.

11:58AM 21 MR. ECCLES: I DON'T KNOW WHAT THE EVIDENCE OF THAT
11:58AM 22 IS, BUT--

11:58AM 23 THE COURT: NO, I DON'T THINK ANYBODY DISPUTES--I'M
11:58AM 24 NOT DISPUTING THAT THE STATE CAN CONTRACT OUT CERTAIN SERVICES.
11:58AM 25 I DON'T THINK THE COURT IS IN A POSITION TO ORDER THE STATE

11:58AM 1 TO STOP THAT. I DON'T HAVE ANY REASON TO DO THAT.

11:58AM 2 NOW, YOU ARE ADDRESSING THE FIRST BULLET POINT ON
11:58AM 3 PAGE 5. CORRECT?

11:58AM 4 MR. ECCLES: YES, YOUR HONOR.

11:58AM 5 THE COURT: AND IT SAYS THAT THE STATE WILL TRAIN
11:58AM 6 ITS OWN STAFF. RIGHT?

11:58AM 7 MR. ECCLES: YES, YOUR HONOR.

11:58AM 8 THE COURT: AND YOU HAVE AN OMBUDSMAN'S OFFICE THAT
11:58AM 9 IS THERE TO ADDRESS PROBLEMS, I GUESS.

11:59AM 10 MR. ECCLES: YES, YOUR HONOR. IT IS A--IT'S NOT AN
11:59AM 11 ENTRY-LEVEL CALL CENTER POSITION; THESE FOLKS ARE WELL-TRAINED.
11:59AM 12 AND IF YOU GO THROUGH THESE DECLARATIONS THAT ARE EXHIBITS 4
11:59AM 13 AND 2 ESPECIALLY, BUT I THINK IT'S MOSTLY 4, YOU GO THROUGH NOT
11:59AM 14 ONLY THE TRAINING THAT THEY RECEIVED AT THE FRONT END, BEFORE
11:59AM 15 JANUARY OF 2008, BUT THEN AS THIS CHANGE OCCURRED, WHAT
11:59AM 16 ADDITIONAL TRAINING THAT THEY RECEIVED AND THEIR PROCESSES FOR
11:59AM 17 HOW TO DEAL WITH THE TRANSITION AND THEREAFTER ONCE PHARMACY
11:59AM 18 BENEFITS ARE BEING DIRECTLY MANAGED UNDER MANAGED CARE.

11:59AM 19 THE COURT: YEAH. OKAY. SO I NEED TO READ THE
11:59AM 20 GARY DECLARATION, WHICH IS EXHIBIT 4--

11:59AM 21 MR. ECCLES: YES, SIR.

12:00PM 22 THE COURT: --EXHIBIT 2, CASTARENO DECLARATION; AND
12:00PM 23 EXHIBIT 10, DAWN REHBEIN'S DECLARATION. OKAY. AND THAT'S YOUR
12:00PM 24 EVIDENCE THAT YOU HAVE COMPLIED WITH BULLET POINT 1 ON PAGE 5?

12:00PM 25 MR. ECCLES: YES, YOUR HONOR.

12:00PM 1 THE COURT: OKAY.

12:00PM 2 MR. ECCLES: AND THAT'S GONNA BE TRUE OF THIS ENTIRE
12:00PM 3 GRID, THIS ENTIRE EXHIBIT. I WANTED TO PROVIDE THE COURT WITH
12:00PM 4 EXHIBIT BY EXHIBIT AS WELL AS, HOPEFULLY, A DECLARATION IF I
12:00PM 5 HAD TO EXPLAIN ANY EXHIBITS THAT MIGHT FOLLOW IT THAT SHOWED
12:00PM 6 THAT AT THE TIME--THIS IS A CORRECTIVE ORDER GOING ON SINCE
12:00PM 7 2007--THAT WE HAVE HIT THESE MILESTONES. WE HAVE DONE WHAT
12:00PM 8 WE WERE SUPPOSED TO DO.

12:00PM 9 THE PLAINTIFFS' ARGUMENT SEEMS TO FOCUS ON--LET'S
12:00PM 10 SEE, WHERE'S MY YELLOW TAB? WE HEARD THAT IN 1996--WE HEARD
12:01PM 11 EVIDENCE ABOUT WHAT WAS GOING ON IN 1996, THAT MATTERS WERE
12:01PM 12 CONFUSING FOR DOCTORS.

12:01PM 13 WITH RESPECT TO MS. SWANSON, THE CORRECTIVE ACTION
12:01PM 14 ORDER AND CONSENT DECREE PARAGRAPHS THAT WE'RE TALKING ABOUT
12:01PM 15 HERE DO NOT REQUIRE--NOT ONLY PERFECTION, BUT THIS SORT OF
12:02PM 16 "IT COULD BE BETTER" ARGUMENT. I UNDERSTAND AND APPRECIATE
12:02PM 17 IT. AND THE STATE DOES WANT TO MAKE MEDICAID BETTER. BUT WHAT
12:02PM 18 WE'RE TALKING ABOUT HERE IS: DID THE STATE SATISFY THE VERY
12:02PM 19 STRAIGHTFORWARD CORRECTIVE ACTION ORDER REQUIREMENTS? AND
12:02PM 20 IS THERE AN ENFORCEABLE PROVISION UNDER THE CONSENT DECREE
12:02PM 21 UNDER THE NARROW RANGE IN THE PARAGRAPHS WE'RE TALKING ABOUT
12:02PM 22 THAT THE STATE HAS VIOLATED OR HAVE WE SATISFIED THOSE AS WELL
12:02PM 23 AND CAN WE LET THEM GO?

12:02PM 24 NOW, I'M HAPPY TO TALK ABOUT ANY OF THESE BULLET
12:02PM 25 POINTS OR I'M ALSO HAPPY TO JUST LET EXHIBIT 5 AND THE REST OF

12:02PM 1 THE EXHIBITS SPEAK FOR THEMSELVES AND NOT BELABOR THE POINTS.

12:02PM 2 BUT I DO WANT TO TALK ABOUT PARAGRAPHS 3 AND 190.

12:02PM 3 ALL OF US HERE AT THE TABLE HAVE OUR BOUND VERSIONS OF THE
12:03PM 4 CONSENT DECREE WITH THIS LOVELY SORT OF 1980S FONT UP FRONT.

12:03PM 5 THE COURT: YES, I HAVE 3 AND 190 RIGHT HERE.

12:03PM 6 3 SAYS, "MEDICAID RECIPIENTS ARE ALSO ENTITLED TO ALL NEEDED
12:03PM 7 FOLLOW-UP HEALTHCARE SERVICES." OKAY.

12:03PM 8 MR. ECCLES: "RECIPIENTS ARE ALSO ENTITLED TO ALL
12:03PM 9 NEEDED FOLLOW-UP HEALTHCARE SERVICES THAT ARE PERMITTED BY
12:03PM 10 FEDERAL MEDICAID LAW, 42 UNITED STATES CODE, SECTION 1396R."
12:03PM 11 THIS IS IN THE INTRODUCTION SECTION OF THE CONSENT DECREE.
12:03PM 12 THIS IS NOT A SPECIFICALLY ENFORCEABLE PROVISION. AND TO MAKE
12:03PM 13 IT CLEAR, WE'RE NOT EVEN HERE TRYING TO GET RID OF IT TODAY.

12:03PM 14 THE COURT: OKAY.

12:03PM 15 MR. ECCLES: THEY TALK ABOUT 190. AND THIS COURT--

12:03PM 16 THE COURT: AS A MATTER OF FACT, YOU CAN'T GET RID
12:03PM 17 OF IT. IT'S FEDERAL LAW.

12:03PM 18 MR. ECCLES: EXACTLY. I'M NOT TRYING TO GET RID OF
12:03PM 19 IT. NOR, THOUGH, CAN WE EXPECT THAT THIS CAN BE INTERPRETED IN
12:04PM 20 THIS BROAD FASHION AS TO SPILL INTO AND MAKE OTHER PROVISIONS
12:04PM 21 THAT ARE DISCRETE PROVISIONS AND ENFORCEABLE PROVISIONS WITHIN
12:04PM 22 THIS CONSENT DECREE MEAN SOMETHING THAT THEY DON'T SAY.

12:04PM 23 THIS SAYS THAT THEY'RE ENTITLED TO FEDERAL MEDICAID
12:04PM 24 LAW AND GIVES A SECTION. FINE.

12:04PM 25 190, WHICH IS IN THE MANAGED-CARE SECTION, AS THIS

12:04PM 1 COURT POINTED OUT IN ITS VERY LAST ORDER ON LAGGING COUNTIES--
12:04PM 2 AND WHEN I SAY "THIS COURT," I MEAN JUDGE SCHELL. OFTENTIMES
12:04PM 3 IN THIS CASE WHEN WE SAY "THIS COURT" IT MEANS JUDGE JUSTICE.
12:04PM 4 BUT THIS COURT SPECIFICALLY DISCUSSED THAT IN 190 WE'RE TALKING
12:04PM 5 ABOUT A MANAGED-CARE SECTION OF THE DECREE, NOT LAGGING
12:04PM 6 COUNTIES AT THAT TIME.

12:04PM 7 BUT HERE WE'RE NOT USING 190 BECAUSE WE'RE TALKING
12:05PM 8 ABOUT TRAINING OF PHARMACISTS. THAT'S THE PARAGRAPHS IN THE
12:05PM 9 CONSENT DECREE THAT WE'RE TALKING ABOUT HERE. AND THAT'S 124
12:05PM 10 THROUGH 130. AND TO THE EXTENT THAT--

12:05PM 11 THE COURT: BUT ALL RECIPIENTS--I MEAN ALL MEDICAID
12:05PM 12 PARTICIPANTS ARE RECIPIENTS OF MANAGED CARE NOW BECAUSE THE
12:05PM 13 STATE HAS SWITCHED TO MANAGED CARE.

12:05PM 14 MR. ECCLES: UNDERSTOOD.

12:05PM 15 THE COURT: OKAY.

12:05PM 16 MR. ECCLES: WE'RE NOT TRYING TO GET RID OF 190. SO
12:05PM 17 IF WE'RE NOT HERE TRYING TO GET A 60(B) AND HAVE YOU DISPOSE OF
12:05PM 18 190, THEN I'M NOT EXACTLY SURE WHY WE'RE HERE ON A MOTION TO
12:05PM 19 EXTEND A CORRECTIVE ACTION ORDER THAT'S DEALING WITH TRAINING
12:05PM 20 PHARMACISTS.

12:05PM 21 THE COURT: YOU FILED YOUR MOTION UNDER RULE
12:05PM 22 60(B)(5), WHICH STATES THAT THE COURT MAY RELIEVE A PARTY FROM
12:05PM 23 A FINAL JUDGMENT OR ORDER IF THE JUDGMENT HAS BEEN SATISFIED.
12:06PM 24 OKAY. SO THE ORDER OR JUDGMENT--AND THESE ARE ORDERS,
12:06PM 25 CORRECTIVE ACTION ORDERS. THE CONSENT DECREE, I SUPPOSE,

12:06PM 1 IS A JUDGMENT. NEVERTHELESS, I DON'T THINK THAT TERMINOLOGY
12:06PM 2 MATTERS. THE QUESTION IS JUST WHETHER YOU'VE SATISFIED
12:06PM 3 PARAGRAPHS 3, 190 AND 124 THROUGH 130 OF THE DECREE AND THE
12:06PM 4 TWO BULLET POINTS THAT WE'VE NARROWED THIS DOWN TO FOR THE
12:06PM 5 CORRECTIVE ACTION ORDER.

12:06PM 6 MR. ECCLES: AND I WOULD LOVE TO GET OUT OF 3 AND
12:06PM 7 190, BUT THAT'S NOT WHAT WE MOVE FOR.

12:06PM 8 THE COURT: YOU WOULD LOVE TO WHAT?

12:06PM 9 MR. ECCLES: I WOULD LOVE TO GET OUT OF 3 AND 190,
12:06PM 10 BUT WE DIDN'T MOVE FOR THAT AND WE DIDN'T PROVE EVIDENCE OF
12:07PM 11 SATISFACTION OF THOSE TWO.

12:07PM 12 THE COURT: YEAH. REALLY, I THINK, AS FAR AS THE
12:07PM 13 DECREE IS CONCERNED, THE FOCUS SHOULD BE ON PARAGRAPHS 129 AND
12:07PM 14 130.

12:07PM 15 MR. ECCLES: I COMPLETELY AGREE. AND TO THE EXTENT
12:07PM 16 THAT THOSE DO, AS PARAGRAPH 130 STATES, IT CONTAINS THE WORD
12:07PM 17 "WILL," IT BECOMES AN ENFORCEABLE PROVISION. "BY JANUARY 31,
12:07PM 18 1996, DEFENDANTS WILL IMPLEMENT AN INITIATIVE TO EFFECTIVELY
12:07PM 19 INFORM PHARMACISTS ABOUT EPSDT AND, IN PARTICULAR, ABOUT
12:07PM 20 EPSDT'S COVERAGE OF ITEMS FOUND IN PHARMACIES."

12:07PM 21 THAT'S WHERE THE PLAINTIFFS STOP READING AND THEN
12:07PM 22 THEY WANT YOU TO INTERPRET "EFFECTIVELY INFORMING PHARMACISTS"
12:07PM 23 SOME OTHER WAY. BUT THAT PARAGRAPH DOES CONTINUE. AND I
12:07PM 24 WOULD SUGGEST TO THE COURT THAT IF YOU ARE TRYING TO DETERMINE
12:07PM 25 WHAT "EFFECTIVE" MEANS, STAYING IN THE PARAGRAPH IS PROBABLY

12:07PM 1 THE FIRST PLACE YOU SHOULD LOOK. "THE EFFORT WILL INCLUDE
12:08PM 2 PRESENTATIONS AT MEETINGS, IF POSSIBLE, ARTICLES IN THE TPA
12:08PM 3 NEWSLETTERS, IF POSSIBLE, AND AT LEAST ONE MAILOUT TO ALL
12:08PM 4 PHARMACISTS WHO PARTICIPATE IN THE MEDICAID PROGRAM. THE
12:08PM 5 MAILOUT WILL BE DESIGNED TO ATTRACT PHARMACISTS' ATTENTION,
12:08PM 6 EXPLAIN EPSDT COVERAGE CLEARLY AND ENCOURAGE PHARMACISTS TO
12:08PM 7 PROVIDE THE FULL GAMUT OF COVERED PHARMACEUTICAL PRODUCTS TO
12:08PM 8 RECIPIENTS AS NEEDED."

12:08PM 9 BOY, DID WE DO THAT. AND THERE'S LOADS OF EVIDENCE.
12:08PM 10 EVERYTHING THAT WE SAID TO SATISFY THE COMMUNICATIONS TO
12:08PM 11 PHARMACISTS ABOUT THIS THAT'S CONTAINED, AGAIN, IN EXHIBIT 5
12:08PM 12 AND IN THE BULLET POINTS THAT WE JUST WENT THROUGH--

12:08PM 13 THE COURT: EXHIBIT 5 ADDRESSES THE TWO BULLET
12:08PM 14 POINTS--ALL OF THEM, BUT THE TWO THAT WE'RE FOCUSING ON.

12:08PM 15 MR. ECCLES: YES.

12:08PM 16 THE COURT: IS THERE AN EXHIBIT THAT YOU HAVE THAT
12:08PM 17 ADDRESSES PARAGRAPHS 129 AND 130 OF THE DECREE AND WHAT YOU'VE
12:08PM 18 DONE TO SATISFY THOSE?

12:08PM 19 MR. ECCLES: WELL, I BELIEVE THAT WE DID IT BACK IN
12:08PM 20 1996. HOWEVER, TO JUST CONTINUE ALONG WHAT WE'VE BEEN DOING
12:09PM 21 RECENTLY, EVERYTHING THAT WAS SUBMITTED REGARDING DEFENDANTS
12:09PM 22 WILL CONTINUE THEIR EDUCATIONAL EFFORTS WITH RESPECT TO ALL
12:09PM 23 MEDICAID PHARMACIES, USING SUCH MEANS AS NEWSLETTERS, FAX
12:09PM 24 NOTICES TO STAKEHOLDERS, COMPUTER-BASED TRAINING, INFORMATION
12:09PM 25 ON THEIR PUBLIC WEB SITE, ALL OF THE STUFF THAT WE DID TO

12:09PM 1 SATISFY THAT BULLET POINT FAR AND AWAY SATISFIES 129.

12:09PM 2 THE COURT: OKAY. YEAH. I JUST DIDN'T KNOW IF
12:09PM 3 YOU HAD ANOTHER CHART THAT TALKS ABOUT PARAGRAPHS 129 AND 130
12:09PM 4 OF THE DECREE, AS YOU HAVE DONE FOR THE BULLET POINTS IN THE
12:09PM 5 CAO. IT JUST HELPS ME KNOW WHERE TO GO TO FIND THINGS.

12:10PM 6 MR. ECCLES: AND I APOLOGIZE FOR THAT. THE
12:10PM 7 CORRECTIVE ACTION ORDER--THAT WHICH SATISFIES THE CORRECTIVE
12:10PM 8 ACTION ORDER, IN MY UNDERSTANDING, SHOULD SATISFY THE CONSENT
12:10PM 9 DECREE.

12:10PM 10 THE COURT: OKAY.

12:10PM 11 MR. ECCLES: THIS PARTICULAR CORRECTIVE ACTION
12:10PM 12 ORDER IS MUCH BROADER IN ITS REQUIREMENTS THAN THE SPECIFIC
12:10PM 13 REQUIREMENTS OF THE CONSENT DECREE PARAGRAPHS 129 AND 130.
12:10PM 14 SO DEFENDANTS WOULD MAINTAIN THAT THAT WHICH SATISFIES THE
12:10PM 15 EDUCATION AND THE EVALUATION PART OF 130 WILL GO AHEAD AND
12:10PM 16 SUBSTITUTE AS ITS EVIDENCE OF SATISFACTION OF THOSE PARAGRAPHS.

12:10PM 17 THE COURT: OKAY. SO THE EXHIBITS THAT YOU PROVIDE
12:10PM 18 TO ME IN COLUMN 3 OF YOUR EXHIBIT 5 TO YOUR RESPONSE AND MOTION
12:10PM 19 WOULD ALSO EXPLAIN HOW THE STATE HAS MADE PRESENTATIONS AT
12:10PM 20 MEETINGS OF THE TEXAS PHARMACEUTICAL ASSOCIATION, HAS--I DON'T
12:11PM 21 KNOW--WRITTEN OR PROVIDED ARTICLES IN THE TPA NEWSLETTER...

12:11PM 22 MR. ECCLES: IT EXPLAINS CERTAINLY IN THE DEFINITION
12:11PM 23 THAT IS APPARENT FROM THE TEXT OF 129 THAT DEFENDANTS HAVE
12:11PM 24 IMPLEMENTED AN INITIATIVE TO EFFECTIVELY INFORM PHARMACISTS
12:11PM 25 ABOUT EPSDT.

12:11PM 1 THE COURT: OKAY. JUST SO I'LL KNOW, HAS THE STATE
12:11PM 2 MADE PRESENTATIONS AT MEETINGS OF THE TEXAS PHARMACEUTICAL
12:11PM 3 ASSOCIATION?

12:11PM 4 MR. ECCLES: YES.

12:11PM 5 THE COURT: OKAY.

12:11PM 6 MR. ECCLES: I BELIEVE THERE'S AN ANNUAL THING AS
12:11PM 7 WELL WHERE THERE'S A BOOTH. AND THAT'S BEEN EVERY YEAR SINCE
12:11PM 8 2008, I THINK. AND THAT'S AS WELL IN THE EXHIBITS THAT ARE
12:11PM 9 POINTED OUT IN DEFENDANTS' EXHIBIT 5.

12:11PM 10 THE COURT: OKAY.

12:11PM 11 HAS THE STATE PROVIDED ARTICLES IN THE TPA
12:12PM 12 NEWSLETTER?

12:12PM 13 MR. ECCLES: YES.

12:12PM 14 THE COURT: AND THE THIRD THING, AT LEAST ONE
12:12PM 15 MAILOUT TO ALL PHARMACISTS WHO PARTICIPATE IN THE MEDICAID
12:12PM 16 PROGRAM. NOT JUST THE 822, BUT ALL PHARMACISTS. HAVE YOU
12:12PM 17 DONE THAT?

12:12PM 18 MR. ECCLES: YES. IT WAS SENT TO EVERY PHARMACIST'S
12:12PM 19 HOME A NUMBER OF YEARS AGO, ALL, I THINK, 7800.

12:12PM 20 THE COURT: IS THERE ANY--

12:12PM 21 MR. ECCLES: TO 7200 REGISTERED PHARMACISTS AND
12:12PM 22 TECHS IN 2009.

12:12PM 23 THE COURT: OKAY. IS THERE ANY DISPUTE BY THE
12:12PM 24 PLAINTIFFS--

12:12PM 25 MR. ECCLES: DID I SAY 7200 OR 72,000?

12:12PM 1 THE COURT: YOU SAID 7200.

12:12PM 2 MR. ECCLES: 72,000.

12:13PM 3 THE COURT: 72,000? OH, PHARMACISTS? INDIVIDUALLY?

12:13PM 4 MR. ECCLES: AND TECHS. THERE'S A POSITION KNOWN AS
12:13PM 5 PHARMACY TECH.

12:13PM 6 THE COURT: OKAY. SO A LETTER WAS SENT OUT TO
12:13PM 7 72,000 PHARMACIES AND PHARMACY TECHS?

12:13PM 8 MR. ECCLES: I BELIEVE IT WAS ACTUALLY A PACKET
12:13PM 9 OF INFORMATION THAT WOULD CERTAINLY COVER ALL OF THESE,
12:13PM 10 EFFECTIVELY INFORMING PHARMACISTS ABOUT EPSDT COVERAGE AND
12:13PM 11 ITEMS FOUND IN PHARMACIES. AND WE HAVE THAT PACKET AS PART
12:13PM 12 OF CASTORENO'S DECLARATION.

12:13PM 13 THE COURT: OKAY.

12:13PM 14 MS. SWANSON, IS THERE ANY DISPUTE THAT THE STATE HAS
12:13PM 15 DONE THOSE THREE THINGS THAT I HAVE GONE OVER IN PARAGRAPH 129
12:13PM 16 OF THE DECREE?

12:13PM 17 MS. SWANSON: YOUR HONOR, I'M NOT QUITE SURE WHAT
12:13PM 18 YOU ARE ASKING.

12:13PM 19 THE COURT: WELL, I JUST ASKED MR. ECCLES--AND I'M
12:13PM 20 LOOKING AT PARAGRAPH 129 OF THE CONSENT DECREE, WHICH REQUIRES
12:14PM 21 THE STATE--THESE ARE CONCRETE THINGS THAT--ACTUALLY, IT DOESN'T
12:14PM 22 REQUIRE THE STATE, BUT IT SAYS "THE EFFORT WILL INCLUDE." AND
12:14PM 23 THIS IS THE EFFORT TO EFFECTIVELY INFORM PHARMACISTS ABOUT THE
12:14PM 24 EPSDT COVERAGE.

12:14PM 25 MS. SWANSON: OH, I SEE WHAT YOU MEAN, YOUR HONOR.

12:14PM 1 THE COURT: PRESENTATIONS AT MEETINGS OF THE TEXAS
12:14PM 2 PHARMACEUTICAL ASSOCIATION, ARTICLES IN THE TPA NEWSLETTER,
12:14PM 3 AND AT LEAST ONE MAILOUT TO ALL PHARMACISTS. DO YOU AGREE
12:14PM 4 WITH MR. ECCLES THAT THE STATE HAS DONE THOSE THREE THINGS?

12:14PM 5 MS. SWANSON: I'M CONFIDENT THEY'VE DONE
12:14PM 6 PRESENTATIONS AT MEETINGS OF THE TEXAS PHARMACEUTICAL
12:14PM 7 ASSOCIATION.

12:14PM 8 AND ARTICLES IN THE TPA NEWSLETTER, I'M SURE THEY'VE
12:14PM 9 DONE THAT. I THINK I'VE SEEN ONE OR TWO.

12:14PM 10 I HAVE NOT SEEN AN EXAMPLE OF A MAILOUT TO ALL
12:14PM 11 PHARMACISTS THAT PARTICIPATE IN THE MEDICAID PROGRAM, BUT IF
12:15PM 12 MR. ECCLES IS TELLING THE COURT THAT HE'S PERSONALLY AWARE
12:15PM 13 THAT THAT HAS BEEN DONE, I WOULD CERTAINLY NOT DISPUTE IT.

12:15PM 14 THE COURT: OKAY.

12:15PM 15 MS. SWANSON: IF HE'S TELLING YOU HE'S POSITIVE THAT
12:15PM 16 IT'S BEEN DONE, THEN IT HAS BEEN. OUR CONCERN IS EFFECTIVE
12:15PM 17 EDUCATION.

12:15PM 18 THE COURT: OKAY.

12:15PM 19 DO YOU HAVE THAT LETTER THAT WAS SENT OUT TO 72,000
12:15PM 20 PHARMACISTS AND TECHS?

12:15PM 21 MR. ECCLES: I'M LOOKING FOR THAT RIGHT NOW. WHICH
12:15PM 22 MEANS IT'S GOING TO BE LOST IN THE MASSIVE EXHIBIT 1. WE WILL
12:15PM 23 FIND THE PAGE IN THE UNFORTUNATELY GROTESQUELY OVERSIZED
12:15PM 24 EXHIBIT 1 AND ATTEMPT TO IDENTIFY THAT MORE SPECIFICALLY.

12:15PM 25 THE COURT: OKAY. THANK YOU.

12:16PM 1 WELL, YOU'VE TOLD ME WHAT TO LOOK AT. I'M GOING TO
12:16PM 2 NEED TO LOOK AT THESE EXHIBITS IN COLUMN 3 OF YOUR CHART THAT
12:16PM 3 IS DEFENDANTS' EXHIBIT 5. AND IT IS YOUR POSITION, MR. ECCLES,
12:16PM 4 THAT THAT EFFORT THAT'S SUMMARIZED IN COLUMN 3 WILL DEMONSTRATE
12:17PM 5 THE STATE HAS COMPLIED WITH THE TWO DISPUTED BULLET POINTS IN
12:17PM 6 THE CORRECTIVE ACTION ORDER 637-8 AND WITH PARAGRAPHS 129, 130
12:17PM 7 AND 190 OF THE DECREE?

12:17PM 8 MR. ECCLES: AGAIN, I WOULD LOVE TO TAKE 190 OUT,
12:17PM 9 BUT WE DID NOT MOVE FOR THAT. AND THAT IS THE MANAGED-CARE
12:17PM 10 SECTION.

12:17PM 11 THE COURT: OKAY. WELL, 190 JUST SAYS--IT'S GENERAL--
12:17PM 12 "MEDICAID RECIPIENTS ARE ENTITLED TO THE FULL RANGE OF EPSDT
12:17PM 13 SERVICES IF THEY ARE SERVED BY MANAGED-CARE ORGANIZATIONS."
12:17PM 14 I DON'T KNOW THAT IT ADDS ANYTHING, BUT--

12:18PM 15 MR. ECCLES: I DON'T BELIEVE IT CONTAINS ANY
12:18PM 16 ENFORCEABLE PROVISIONS. I DON'T BELIEVE ANY PARAGRAPH THAT
12:18PM 17 CONTAINS THE WORD "WILL" DOES.

12:18PM 18 THE COURT: YEAH, I WOULD SAY THAT I'M INCLINED TO
12:18PM 19 AGREE WITH YOU. "ENTITLED." IT SAYS THEY'RE ENTITLED TO THE
12:18PM 20 TIMELY RECEIPT. WELL, IN A SENSE, IT DOES OBLIGATE--IT DOES
12:18PM 21 MAKE CLEAR--AND THE STATE AGREED TO THIS, THIS CONSENT DECREE--
12:18PM 22 THAT EPSDT RECIPIENTS ARE ENTITLED TO TIMELY RECEIPT OF EPSDT
12:18PM 23 SERVICES.

12:18PM 24 MR. ECCLES: AND OUR POLICIES SUPPORT THAT AND I
12:18PM 25 BELIEVE THAT JUST FOLLOWS LAW.

12:18PM 1 THE COURT: OKAY.

12:18PM 2 MR. ECCLES: I FEEL LIKE I SHOULD BE SAYING MORE,
12:18PM 3 YET I'M NOT SURE THAT I SHOULD BE. I WANT TO ARGUE EFFECTIVELY
12:19PM 4 TO THIS COURT WITHOUT--WITHOUT HAMMING IT UP OVER CERTAIN
12:19PM 5 POINTS. OR IT'S POSSIBLE THAT I MAYBE SHOULD JUST GO ON TO
12:19PM 6 THE MOTION TO STRIKE.

12:19PM 7 MS. SWANSON: YOUR HONOR, I WOULD LIKE THE
12:19PM 8 OPPORTUNITY TO RESPOND TO MR. ECCLES BRIEFLY BEFORE WE GET INTO
12:19PM 9 THE MOTION TO STRIKE.

12:19PM 10 THE COURT: OKAY.

12:19PM 11 I THINK, REALLY--I DON'T KNOW THAT I HAVE ANY
12:19PM 12 QUESTIONS FOR YOU UNTIL I TAKE A LOOK AT THE EXHIBITS YOU LIST
12:19PM 13 IN COLUMN 3 OF YOUR EXHIBIT 5. I THINK THAT'S WHAT THIS KIND
12:19PM 14 OF COMES DOWN TO.

12:19PM 15 MR. ECCLES: IT DOES.

12:19PM 16 THE COURT: SO LET ME HEAR FROM MS. SWANSON AND THEN
12:19PM 17 WE'LL GO TO THE MOTION TO STRIKE.

12:19PM 18 MS. SWANSON: LET ME SEE, YOUR HONOR, IF I CAN GET
12:20PM 19 THE DOCUMENT CAMERA ON.

12:20PM 20 THE COURT: OKAY. MS. SANFORD WILL TURN IT ON FOR
12:20PM 21 YOU. IT SHOULD BE ON NOW.

12:20PM 22 MS. SWANSON: THANK YOU, YOUR HONOR.

12:20PM 23 FIRST, JUST A FEW THINGS ABOUT THE MEDICAID OVERVIEW
12:20PM 24 THAT WAS PRESENTED, WHICH IS, IN MOST RESPECTS, CORRECT.
12:20PM 25 DEFENDANTS KEEP REFERRING TO PRESCRIPTION-DRUG COVERAGE AS

12:20PM 1 BEING AN OPTIONAL MEDICAID BENEFIT FOR STATES. THAT'S TRUE FOR
12:20PM 2 ADULTS, IT IS NOT TRUE FOR CHILDREN. IT IS A REQUIRED BENEFIT
12:20PM 3 FOR CHILDREN. AND 42 USC, SECTION 1396D(R), DEFINES THE
12:21PM 4 SERVICES THAT EPSDT MUST INCLUDE. AND BY REFERRING BACK TO
12:21PM 5 1396D(A), IT MAKES IT CLEAR THAT THOSE DO INCLUDE PRESCRIPTION
12:21PM 6 DRUGS AS WELL AS SO-CALLED HOME HEALTH SUPPLIES, WHICH INCLUDE
12:21PM 7 MEDICAL SUPPLIES AND EQUIPMENT THAT CHILDREN NEED.

12:21PM 8 THE COURT: LET ME ASK YOU A QUESTION JUST ABOUT
12:21PM 9 MEDICAID IN GENERAL. FOR PRESCRIPTIONS, DOES MEDICAID REQUIRE
12:21PM 10 THE RECIPIENT, WHETHER IT'S A CHILD OR AN ADULT, TO PAY ANY
12:21PM 11 PORTION OF THE COST OF THE DRUG?

12:21PM 12 MS. SWANSON: MEDICAID DOES NOT REQUIRE THAT. CHIP
12:21PM 13 REQUIRES THAT. CHIP, THE PROGRAM FOR THE PUBLICLY OR PARTIALLY
12:21PM 14 PUBLICLY FUNDED PROGRAM FOR CHILDREN WITH SLIGHTLY HIGHER
12:21PM 15 INCOMES. AND WHEN I ANSWERED YOUR QUESTION, I WAS THINKING
12:21PM 16 OF CHILDREN. I DON'T KNOW WHETHER THERE ARE STATES THAT MIGHT
12:21PM 17 REQUIRE A COPAYMENT FOR ADULTS IN SOME CIRCUMSTANCES, BUT IT'S
12:22PM 18 NOT PERMISSIBLE FOR CHILDREN. AND TEXAS DOES NOT REQUIRE A
12:22PM 19 COPAYMENT.

12:22PM 20 THE COURT: OKAY.

12:22PM 21 MS. SWANSON: IN FACT, THEY COULDN'T.

12:22PM 22 THE COURT: OKAY. AND, LET'S SEE, LET ME FIND--

12:22PM 23 MS. SWANSON: I GUESS ONE OTHER THING ABOUT THAT
12:22PM 24 PAGE. CURRENTLY--DEFENDANTS HAVE POINTED OUT THAT CURRENTLY
12:22PM 25 ALL STATES DO OFFER OUTPATIENT DRUG BENEFITS, APPARENTLY,

12:22PM 1 INCLUDING FOR ADULTS. I THINK THAT SHOWS US THAT THERE'S A
12:22PM 2 REASON FOR THAT, AND THAT IS THAT PROVIDING PRESCRIPTIONS WHEN
12:22PM 3 THEY'RE NEEDED CAN HELP CUT THE COST OF SOME OTHER VERY HIGH-
12:22PM 4 DOLLAR EXPENSES, SUCH AS HOSPITAL CARE.

12:22PM 5 DEFENDANTS ALSO POINTED OUT IN THEIR OVERVIEW HOW
12:22PM 6 MUCH THEY SPENT ON PRESCRIPTION DRUGS. AND THAT CERTAINLY IS
12:22PM 7 SOMETHING APPROPRIATE TO BE CONCERNED ABOUT. THEY SPENT TWO
12:22PM 8 AND A HALF BILLION ON PRESCRIPTION DRUGS. THIS SLIDE, WHICH IS
12:23PM 9 PAGE 32 FROM THE POWERPOINT THAT WAS PRESENTED BEFORE THE COURT
12:23PM 10 HEARING IN APRIL OF 2012 CONCERNING PROVIDER SUPPLY, THIS SHOWS
12:23PM 11 THE GENERAL BREAKDOWN, NOT THE PRESCRIPTION-DRUG BREAKDOWN, BUT
12:23PM 12 THE GENERAL BREAKDOWN OF HOW TEXAS SPENDS ITS MEDICAID DOLLARS.

12:23PM 13 THE COLUMN ON THE LEFT IS THE NUMBER OF PEOPLE THAT
12:23PM 14 ARE IN THE CASELOAD, THE NUMBER OF PEOPLE THAT ARE ON MEDICAID.
12:23PM 15 AND IN TEXAS THAT IS AN AWFUL LOT OF PEOPLE. THE MAJORITY OF
12:23PM 16 THEM ARE CHILDREN, POVERTY-LEVEL CHILDREN.

12:23PM 17 ON THE RIGHT, WE HAVE THE BREAKDOWN OF WHERE THE
12:23PM 18 MONEY GOES. AND WHERE THE MONEY GOES, IS THE MAJORITY OF THE
12:23PM 19 MONEY GOES TO THE AGED AND DISABLED POPULATION. THEY'RE THE
12:23PM 20 ONES WITH, OVERALL, THE HIGH-DOLLAR EXPENSES.

12:23PM 21 POVERTY-LEVEL CHILDREN HAVE 33 PERCENT OF THE
12:24PM 22 EXPENSES. SOME OF THESE CHILDREN ON MEDICAID ARE HEALTHY
12:24PM 23 CHILDREN; OTHERS HAVE MINOR PROBLEMS; AND, OF COURSE, SOME
12:24PM 24 HAVE SEVERE PROBLEMS.

12:24PM 25 BUT THE MAJORITY OF WHERE THE STATE'S MEDICAID

12:24PM 1 DOLLARS ARE GOING ARE NOT TO CHILDREN, THEY'RE TO AGED AND
12:24PM 2 DISABLED ADULTS. AND WHILE WE DON'T HAVE THE SPECIFIC
12:24PM 3 BREAKDOWN ABOUT PRESCRIPTION DRUGS FOR THAT, IT IS CERTAINLY
12:24PM 4 THE GENERAL PATTERN.

12:24PM 5 THEY NOTE THAT--OR THEY ARGUE THAT ONE PERCENT
12:24PM 6 OF PRESCRIPTIONS ARE FOR THESE DRUGS THAT REQUIRE PRIOR
12:24PM 7 AUTHORIZATION. BUT THERE'S A CATCH TO THAT. THIS IS EXHIBIT
12:24PM 8 2, ATTACHMENT 5 TO DEFENDANTS' RESPONSE AND RULE 60(B)(5)
12:24PM 9 MOTION. AND IT SHOWS YOU HOW THEY COME UP WITH THAT ONE
12:24PM 10 PERCENT. I THINK THIS MAY BE ALL MEDICAID--ALL PAID MEDICAID
12:25PM 11 PRESCRIPTIONS, NOT JUST FOR CHILDREN. BUT WITHOUT REGARD
12:25PM 12 FOR THAT, IT'S PAID MEDICAID PRESCRIPTIONS. THESE ARE THE
12:25PM 13 ONES--THE PRESCRIPTIONS THAT SUCCESSFULLY GET THROUGH THE
12:25PM 14 SYSTEM, GET APPROVED, AND GET PAID. IT DOESN'T TELL US HOW
12:25PM 15 MANY ARE GETTING PRESCRIBED BUT NOT GETTING THROUGH THE SYSTEM.

12:25PM 16 THE OTHER LIMITATION OF IT IS THAT IT INCLUDES 2012,
12:25PM 17 BUT WE CAN SEE FROM THE INFORMATION AT THE BOTTOM THAT THIS
12:25PM 18 TABLE INCLUDES ONLY FEE-FOR-SERVICE PRESCRIPTION CLAIMS. IN
12:25PM 19 OTHER WORDS, IN 2012, THIS WOULD NOT INCLUDE THE MAJORITY OF
12:25PM 20 PRESCRIPTION CLAIMS, BECAUSE THEY WERE THEN IN MANAGED CARE.

12:25PM 21 THE COURT: SO ONLY ONE PERCENT OF THE PRESCRIPTIONS
12:25PM 22 REQUIRED PRIOR AUTHORIZATION?

12:25PM 23 MS. SWANSON: ONLY ONE PERCENT OF THE PRESCRIPTIONS
12:25PM 24 THAT ACTUALLY GOT PAID REQUIRED PRIOR AUTHORIZATION. BUT THAT
12:25PM 25 DOES NOT MEAN THAT ONE PERCENT OF THE PRESCRIPTIONS THAT LANDED

12:26PM 1 AT THE PHARMACY REQUIRED PRIOR AUTHORIZATION. IT TELLS US THAT
12:26PM 2 OUT OF ALL THE SUCCESSFUL PRESCRIPTIONS, ONLY ONE PERCENT WERE
12:26PM 3 THOSE THAT NEEDED PRIOR AUTHORIZATIONS.

12:26PM 4 THE COURT: SO WHAT WOULD BE INCLUDED IN THE OTHER
12:26PM 5 GROUP?

12:26PM 6 MS. SWANSON: "THE OTHER GROUP" MEANING...

12:26PM 7 THE COURT: MEANING THE ONES THAT WEREN'T SUCCESSFUL
12:26PM 8 IN SOME WAY.

12:26PM 9 MS. SWANSON: YES, THE ONES THAT WERE REJECTED
12:26PM 10 AND NEVER GOT PAID. IT DOESN'T TELL US ANYTHING ABOUT THAT.
12:26PM 11 IT SHOULD NOT CREATE THE IMPRESSION THAT OUT OF A HUNDRED
12:26PM 12 PRESCRIPTIONS THAT DOCTORS WRITE, ONE PERCENT OF THEM ARE
12:26PM 13 GOING TO NEED PRIOR AUTHORIZATION. THAT WOULD BE MISLEADING.

12:26PM 14 THE COURT: ARE YOU SAYING THAT THERE MAY BE A
12:26PM 15 HIGHER PERCENT THAT NEED PRIOR AUTHORIZATION AND THEY GO TO
12:26PM 16 THE PHARMACY AND THE PEOPLE DON'T WANT TO WAIT FOR THE PRIOR
12:26PM 17 AUTHORIZATION AND THEY JUST GIVE UP AND GO HOME?

12:26PM 18 MS. SWANSON: WELL, THEY COULDN'T VERY WELL WAIT
12:26PM 19 FOR THE PRIOR AUTHORIZATION IN MOST CIRCUMSTANCES EITHER AT
12:27PM 20 THE DOCTOR'S OFFICE OR IN THE PHARMACY, BECAUSE THE HMO'S HAVE
12:27PM 21 24 HOURS TO PROVIDE IT, AND THERE'S SOME TESTIMONY THEY DON'T
12:27PM 22 PROVIDE IT IN THAT PERIOD. SO IT WOULD NOT BE SOMETHING THAT
12:27PM 23 A FAMILY COULD HANG OUT IN A PHARMACY FOR UP TO 24 HOURS
12:27PM 24 ATTEMPTING TO GET THE PRIOR AUTHORIZATION OR THE REJECTION,
12:27PM 25 WHICH REQUIRES AN APPEAL, WHICH REQUIRES MORE DAYS, MORE TIME.

12:27PM 1 IT'S NOT THE SORT OF PROCESS WHERE YOU WAIT AT THE PHARMACY
12:27PM 2 COUNTER AND THE PHARMACIST IMMEDIATELY CALLS UP THE DOCTOR--

12:27PM 3 THE COURT: I UNDERSTAND. YOU TAKE YOUR 72-HOUR
12:27PM 4 SUPPLY AND YOU GO HOME.

12:27PM 5 MS. SWANSON: RIGHT.

12:27PM 6 THE COURT: AND THEN YOU COME BACK IN A DAY OR TWO.

12:27PM 7 MS. SWANSON: YES. IF YOU GET YOUR 72-HOUR SUPPLY.

12:27PM 8 BUT, OF COURSE, THESE PEOPLE AREN'T. RECALL THAT ON PAGE 7 OF
12:27PM 9 THEIR OVERVIEW THEY REMARK THAT APPROXIMATELY 10 TO 15 PERCENT
12:27PM 10 OF DRUGS THAT ARE COVERED BY MEDICAID IN TEXAS DO REQUIRE PRIOR
12:28PM 11 AUTHORIZATION. NOW, TO BE FAIR, THAT DOESN'T MEAN 10 TO 15
12:28PM 12 PERCENT OF THE PRESCRIPTIONS ARE FOR THOSE DRUGS, BUT WE'RE
12:28PM 13 NOT TALKING ABOUT TWO OR THREE DRUGS, YOUR HONOR, WE'RE TALKING
12:28PM 14 ABOUT 10 TO 15 PERCENT OF THOSE THAT SHOULD BE AVAILABLE TO THE
12:28PM 15 CHILDREN.

12:28PM 16 THE COURT: OKAY. THAT'S 10 PERCENT OF THE DRUGS--
12:28PM 17 10 TO 15 PERCENT, BUT ONLY ONE PERCENT OF THE PAID PRESCRIPTIONS
12:28PM 18 ACTUALLY REQUIRE PRIOR AUTHORIZATION. SO I'M STILL WONDERING
12:28PM 19 ABOUT THAT. DOES THAT MEAN THAT PEOPLE GET THEIR 72-HOUR
12:28PM 20 SUPPLY AND DON'T BOTHER TO COME BACK AND PICK UP THE FULL
12:28PM 21 PRESCRIPTION OR DOES IT MEAN THAT THE DOCTORS NEVER RESPONDED
12:28PM 22 TO THE REQUEST FOR PRIOR AUTHORIZATION, OR BOTH?

12:28PM 23 MS. SWANSON: I THINK IT COULD MEAN A LOT OF
12:28PM 24 DIFFERENT OUTCOMES, NONE OF THEM GOOD. BECAUSE WHEN THE
12:28PM 25 PRESCRIPTION GETS REJECTED--AND WE KNOW A LITTLE BIT ABOUT HOW

12:28PM 1 MANY WERE GETTING REJECTED IN 2011, AND I CAN SHOW YOU THAT.
12:28PM 2 WHEN THE PRESCRIPTION GETS REJECTED, IF EVERYTHING GOES RIGHT,
12:29PM 3 THE CHILD GETS THE 72-HOUR SUPPLY, THE PHARMACIST CALLS THE
12:29PM 4 DOCTOR, THE DOCTOR CALLS THE PHARMACY BENEFITS MANAGER OR SENDS
12:29PM 5 A FAX TO THE PHARMACY BENEFITS MANAGER, THREE DAYS LATER THE
12:29PM 6 CHILD GETS THE PRESCRIPTION. WE CAN TELL, ACTUALLY, FROM
12:29PM 7 THAT ONE PERCENT OF PAID PRESCRIPTIONS THAT THAT IS JUST NOT
12:29PM 8 HAPPENING. THERE ARE OTHER THINGS THAT TELL US THAT AS WELL.

12:29PM 9 IN TERMS OF HOW MANY REJECTIONS THERE ARE, THIS WAS
12:29PM 10 DONE BEFORE THE MARCH 2012 HANDOVER TO THE HMO'S, WHEN THINGS
12:29PM 11 GOT WORSE. THIS SHOWS US--AND THIS IS A STUDY THAT DEFENDANTS
12:29PM 12 DID IN--IT COVERED THE PERIOD MAY OF 2010 TO JULY OF 2010, AND
12:29PM 13 IT IS EXHIBIT 2 TO OUR RESPONSE TO DEFENDANTS' RULE 60(B)(5)
12:30PM 14 MOTION. AT THE TOP, THE CIRCLED NUMBER TELLS US ALL THE PRIOR
12:30PM 15 AUTHORIZATION REQUIRED REJECTIONS THAT OCCURRED DURING THAT
12:30PM 16 ONE THREE-MONTH PERIOD FOR CHILDREN WITH MEDICAID. AND IT'S
12:30PM 17 A TOTAL OF 93,000.

12:30PM 18 NOW, THAT DOES INCLUDE --THEY DID NOT DIFFERENTIATE,
12:30PM 19 WHEN THEY DID THE STUDY, BETWEEN DRUGS THAT WERE GETTING
12:30PM 20 REJECTED BECAUSE THEY WERE NOT ON THE PREFERRED-DRUG LIST
12:30PM 21 AND HAD TO HAVE A PRIOR AUTHORIZATION FOR THAT REASON OR
12:30PM 22 THERE WAS A CLINICAL EDIT THAT SAID "THIS DRUG REQUIRES PRIOR
12:30PM 23 AUTHORIZATION." THAT COULD HAPPEN, FOR EXAMPLE, TO A DOCTOR
12:30PM 24 PRESCRIBING AN ATTENTION-DEFICIT DRUG TO, LET'S SAY, A
12:30PM 25 FOUR-YEAR-OLD. THAT MIGHT TRIGGER ENOUGH CLINICAL EDITS

12:31PM 1 THAT IT WOULD REQUIRE THE DOCTOR TO CONFER WITH THE PHARMACY
12:31PM 2 BENEFITS MANAGER ABOUT THAT DRUG, BECAUSE THAT'S NOT A TYPICAL
12:31PM 3 PRESCRIPTION.

12:31PM 4 BUT, ANYWAY, WE HAVE 93,000 REJECTIONS HERE IN
12:31PM 5 ONE QUARTER IN 2010 BEFORE THINGS GOT MUCH WORSE. WE CAN
12:31PM 6 TELL FROM THAT THERE ARE HUNDREDS OF THOUSANDS OF PRESCRIPTION
12:31PM 7 REJECTIONS A YEAR.

12:31PM 8 I WILL TRY TO SHORTEN THIS BY NOT GOING THROUGH
12:31PM 9 EVERY LINE OF THIS, BUT WE CAN TELL IN THIS STUDY THEY ACTUALLY
12:31PM 10 LOOKED AT WHAT HAPPENED AFTER THESE REJECTIONS. AND IT IS TO
12:31PM 11 THEIR CREDIT THAT THEY DID THIS STUDY, BECAUSE NOW WE KNOW
12:31PM 12 MORE. BUT WHAT WE KNOW MORE IS NOT AT ALL CONDUCIVE TO HAVING
12:31PM 13 US THINK THAT OUR CLIENTS ARE GETTING WHAT THEY'RE LEGALLY
12:31PM 14 ENTITLED TO. IN FACT, IT'S CLEAR THAT THEY'RE NOT.

12:32PM 15 THE DRUG PROGRAM ANALYZED THESE PHARMACIES IN TERMS
12:32PM 16 OF WHETHER THEY FOLLOWED THE REJECTION WITH WHAT THEY TERMED
12:32PM 17 "APPROPRIATE ACTION" OR THEY DID NOT. AND YOU CAN DO THAT BY
12:32PM 18 LOOKING AT THE CLAIMS HISTORY. YOU CAN LOOK AT WHETHER THE
12:32PM 19 CHILD GETS THAT DRUG, MEANING THAT PRIOR AUTHORIZATION WAS
12:32PM 20 GRANTED AND THE CHILD GOT THE DRUG, OR YOU CAN TELL WHETHER THE
12:32PM 21 CHILD GOT A CLOSELY RELATED DRUG, WITHIN WHAT PERIOD OF TIME.
12:32PM 22 AND THAT'S FINE. SOMEBODY CALLED THE DOCTOR, THE DOCTOR
12:32PM 23 DECIDED, "OH, THIS OTHER DRUG WILL DO AND IT IS PREFERRED."
12:32PM 24 SO THEY CAN SEE WHICH ONES ARE FOLLOWING UP WITH WHAT THEY
12:32PM 25 CALL TIMELY APPROPRIATE ACTION.

1 AND EVEN WITH PUTTING THEIR FINGERS ON THE SCALES
2 THERE, THEY CALLED ANYTHING WITHIN A WEEK TIMELY AND APPROPRIATE.
3 FOR A CHILD NEEDING AN ANTIBIOTIC, A CHILD WITH A BROKEN ARM
4 WHO NEEDS PAIN MEDICINE, WITHIN A WEEK IS CERTAINLY NOT TIMELY
5 APPROPRIATE. BUT EVEN COUNTING IT THAT WAY, LET'S LOOK AT
6 HOW MANY PHARMACIES DID NOT FOLLOW THEIR REJECTION WITH TIMELY,
7 APPROPRIATE ACTION. AND THIS IS IN THE PARAGRAPH THAT I HAVE
8 MARKED AND THAT BEGINS WITH THE LETTERS VDP.

9 THEY ANALYZED THE DISTRIBUTION OF PHARMACIES THAT
10 DID NOT FOLLOW THEIR REJECTION WITH TIMELY, APPROPRIATE ACTION.
11 IN THIS GROUP, 943 OF THE 3,316 HAD BEEN PREVIOUSLY TARGETED
12 AND PROVIDED EDUCATION, WHICH APPARENTLY DID NO GOOD. THE
13 NUMBER OF CLIENTS IMPACTED PER PHARMACY, ET CETERA. THE KEY
14 NUMBER OF 3,316, YOU ARE LOOKING AT PHARMACIES FOLLOWING UP A
15 REJECTION WITH TIMELY APPROPRIATE ACTION. AND 3,316 OF THEM
16 DID NOT, THEY FOUND. AND THAT'S OUT OF ABOUT 4,000 PHARMACIES.
17 SO WE DON'T HAVE A SLIGHT BIT OF A PROBLEM WITH CHILDREN'S
18 ACCESS TO PRESCRIPTIONS, WE HAVE A HUGE PROBLEM. WE DON'T HAVE
19 ONE OR TWO PHARMACIES NOT DOING WHAT THEY'RE REQUIRED TO DO, WE
20 HAVE THREE-FOURTHS OF THEM NOT DOING WHAT THEY'RE REQUIRED TO
21 DO.

22 THE COURT: WHICH EXHIBIT IS THAT?

23 MS. SWANSON: THAT IS EXHIBIT 2 TO OUR RESPONSE
24 TO THE DEFENDANTS' RULE 65(B)(5) MOTION. IT IS THE DEFENDANTS'
25 ANALYSIS OF HISTORY FOR 72-HOUR EMERGENCY-SUPPLY CLAIMS.

1 NOW, WE'VE BEEN TALKING A LITTLE BIT ABOUT PARAGRAPH
2 3 AND PARAGRAPH 190 AND HOW THEY FIT IN HERE. YES, WE NEED TO
3 FOCUS ON THE DECREE'S PARAGRAPHS ABOUT PHARMACISTS' EDUCATION,
4 BUT WE ALSO NEED TO LOOK AT PARAGRAPH 3 AND PARAGRAPH 190,
5 BECAUSE THEY ARE INDISPUTABLY APPLICABLE HERE AND THEY'RE
6 INDISPUTABLY BEING VIOLATED.

7 THIS COURT, IN 2000, HELD THAT PARAGRAPH 3 WAS
8 ENFORCEABLE. NO COURT LOOKING AT THIS CASE HAS EVER HELD
9 THAT ONLY THE WORD "WILL" CREATES A MANDATORY ENFORCEABLE
10 OBLIGATION. THE COURT HELD IN 2000 THAT PARAGRAPH 3 WAS
11 ENFORCEABLE. THAT'S ON PAGE 611 OF THE 2000 OPINION.

12 THE COURT: OKAY. BUT MR. ECCLES IS NOT ASKING TO
13 BE RELIEVED OF PARAGRAPH 3. HE JUST SAID THAT A FEW MINUTES
14 AGO.

15 MS. SWANSON: HE'S NOT TRYING TO BE RELIEVED FROM
16 IT, BUT NEITHER ARE HIS CLIENTS COMPLYING WITH IT. BECAUSE
17 OUR CLIENTS ARE ENTITLED--CHILDREN WITH MEDICAID ARE ENTITLED
18 TO GET THE MEDICINE THAT THEY NEED. THEY'RE NOT GETTING IT.
19 THEY'RE ENTITLED TO GET THE MEDICAL EQUIPMENT AND SUPPLIES THAT
20 THEY NEED. AND BOTH PARAGRAPH 3 AND PARAGRAPH 190 GUARANTEE
21 THAT TO THEM. AND THEY ARE NOT GETTING THAT.

22 THIS CORRECTIVE ACTION ORDER, HAD IT BEEN FULLY
23 COMPLIED WITH, WHICH CERTAINLY IT HAS NOT BEEN, IF THAT HAD
24 NOT ACHIEVED THAT OBJECTIVE, THEN WE WOULD NEED TO COME UP
25 WITH SOMETHING ELSE THAT WOULD.

12:36PM 1 THE COURT: OKAY. I AGREE THEY'RE ENTITLED TO IT.
12:36PM 2 THE LAW MAKES IT CLEAR THEY'RE ENTITLED TO FOLLOW-UP HEALTHCARE
12:36PM 3 SERVICES, INCLUDING PRESCRIPTION DRUGS.

12:36PM 4 MR. ECCLES' POSITION IS THAT THE STATE IS MAKING
12:36PM 5 THAT AVAILABLE TO THEM AND IS DOING ITS BEST TO EDUCATE
12:36PM 6 PHARMACISTS TO UNDERSTAND WHAT IS AVAILABLE TO MEDICAID
12:36PM 7 RECIPIENTS.

12:36PM 8 SO I GUESS THE QUESTION IS: TO WHAT EXTENT--I MEAN,
12:36PM 9 YOU ARE ASKING THE COURT TO--YOU MAY BE ASKING THE COURT TO
12:36PM 10 HOLD THE STATE RESPONSIBLE FOR PHARMACISTS WHO, DESPITE THE
12:36PM 11 STATE'S BEST EFFORTS TO EDUCATION THEM, STILL DON'T GET IT.

12:37PM 12 MS. SWANSON: YES, WE ARE SEEKING TO HOLD THE STATE
12:37PM 13 RESPONSIBLE FOR THE ACTIONS OF THEIR CONTRACTORS, BECAUSE THEY
12:37PM 14 ARE RESPONSIBLE FOR THEM. THEY MUST RUN A MEDICAID PROGRAM
12:37PM 15 THAT FOLLOWS THE LAW. THIS COURT HAS DEALT WITH THAT ISSUE
12:37PM 16 AS WELL IN ITS 2000 OPINION, IN NOTE 106, WHERE THE COURT
12:37PM 17 SAID, "DEFENDANTS POINT TO A PROVISION IN THE HMO CONTRACT
12:37PM 18 AS EVIDENCE OF THEIR GOOD-FAITH EFFORTS TO COMPLY, BUT
12:37PM 19 THESE PARAGRAPHS"--I'M PARAPHRASING NOW--THESE PARAGRAPHS
12:37PM 20 UNEQUIVOCALLY MANDATE THAT CLASS MEMBERS ENROLLED IN MANAGED
12:37PM 21 CARE RECEIVE THE FULL RANGE OF EPSDT SERVICES. PARAGRAPH 300
12:37PM 22 MAKES CLEAR THAT THE ULTIMATE RESPONSIBILITY FOR FULFILLING
12:37PM 23 THE DUTIES LIES WITH THE DEFENDANTS.

12:37PM 24 IN ANOTHER PART OF THE OPINION, WHICH I'M TRYING TO
12:38PM 25 PUT MY FINGERS ON NOW, THE COURT SAID THAT WITH RESPECT TO A

12:38PM 1 SITUATION IN WHICH THE DECREE SAID THAT WE WERE ENTITLED TO
12:38PM 2 CERTAIN INFORMATION--NOW I'VE FOUND IT. IT'S ON PAGE 615 OF
12:38PM 3 THE 2000 OPINION, FOOTNOTE 65. IN THAT CASE, THE DECREE
12:38PM 4 REQUIRED CERTAIN INFORMATION FROM THE MANAGED-CARE
12:38PM 5 ORGANIZATIONS. WE WERE NOT GETTING IT. WE DIDN'T GET IT.
12:38PM 6 THEY CAME TO COURT AND TOLD THE COURT, "WE TRIED TO GET IT.
12:38PM 7 WE TOLD THEM THEY HAD TO GIVE IT TO US. WE TOLD THEM WHAT WAS
12:38PM 8 NEEDED. WE TOLD THEM SEVERAL TIMES WHAT WAS NEEDED. WE STILL
12:38PM 9 DON'T HAVE IT. WHAT CAN WE DO?"

12:38PM 10 THE COURT SAID, IN NOTE 65 ON PAGE 615, "DEFENDANTS'
12:38PM 11 ADHERENCE TO THE POSITION THAT THE DATA COLLECTION TECHNIQUE OF
12:38PM 12 THE MANAGED-CARE ENTITIES ARE BEYOND THEIR FULL UNDERSTANDING
12:38PM 13 OR CONTROL IS FURTHER EVIDENCE OF THEIR RECALCITRANCE. IT IS
12:38PM 14 DIFFICULT TO IMAGINE THAT ANY ONE OF THE MCO'S--MANAGED-CARE
12:39PM 15 ORGANIZATIONS--CURRENTLY SERVING THE STATE OF TEXAS WOULD LEAVE
12:39PM 16 BEHIND A LUCRATIVE CONTRACT WERE THE STATE TO DEMAND THE DATA
12:39PM 17 WHICH PLAINTIFFS SEEK AND ARE ENTITLED TO UNDER THE DECREE."
12:39PM 18 AND MORE ABOUT THE DEFENDANTS' ULTIMATE RESPONSIBILITY.

12:39PM 19 SO WE'RE PAYING--THE STATE IS PAYING THE TAXPAYERS'
12:39PM 20 MONEY TO THESE ORGANIZATIONS TO DO WHAT THE LAW REQUIRES, AND
12:39PM 21 IT IS NOT HAPPENING. THERE HAS TO BE SOMETHING THAT CAN BE
12:39PM 22 DONE ABOUT THAT. WE NEED SOME LAW AND ORDER IN THIS MEDICAID
12:39PM 23 PROGRAM. AND THE DEFENDANTS ARE THE ONES IN THE POSITION TO
12:39PM 24 GET THAT DONE.

12:39PM 25 THE COURT: TALKING ABOUT THE HMO'S NOW?

12:39PM 1 MS. SWANSON: WE'RE TALKING ABOUT THE HMO'S AND
12:39PM 2 THEIR PHARMACY BENEFIT MANAGERS, YES. WE'RE ALSO TALKING ABOUT
12:39PM 3 PHARMACISTS. I DON'T WANT TO SOUND LIKE PLAINTIFFS ARE OUT TO
12:39PM 4 GET PHARMACISTS, BUT THESE PEOPLE ARE CONTRACTORS. ARE THEY
12:39PM 5 BEING PAID ENOUGH THAT IT MAKES THEM COMMIT TO COMPLY? MAYBE
12:40PM 6 NOT. MAYBE THAT HAS TO BE ADDRESSED. ARE THEY BEING TOLD THAT
12:40PM 7 "THIS IS NOT OPTIONAL FOR YOU, THIS IS THE LAW, YOU MUST DO
12:40PM 8 IT"?

12:40PM 9 THE COURT: IS THE STATE REQUIRED UNDER FEDERAL LAW
12:40PM 10 OR STATE LAW TO CONTRACT WITH ANY PHARMACY WHO OFFERS ITSELF UP
12:40PM 11 AS A MEDICAID PHARMACY?

12:40PM 12 MS. SWANSON: NO. THE PHARMACIES MUST MEET CERTAIN
12:40PM 13 REQUIREMENTS IN ORDER TO BE CONTRACTED. THEY SIGN A CONTRACT.

12:40PM 14 THE COURT: BUT IF THEY MEET THOSE REQUIREMENTS,
12:40PM 15 MUST THE STATE ACCEPT THEM INTO THE PROGRAM?

12:40PM 16 MS. SWANSON: I DON'T KNOW THE ANSWER TO THAT, YOUR
12:40PM 17 HONOR. I DON'T KNOW OF AN INSTANCE IN WHICH THEY HAVE REJECTED
12:40PM 18 A PHARMACY THAT COMPLIED WITH THEIR STANDARDS. I THINK,
12:40PM 19 ACTUALLY, THEY WOULD BE WANTING TO RECRUIT MORE PHARMACIES.
12:40PM 20 AND IF A PHARMACY IS SET UP AND MEDICATION-HANDLING STANDARDS
12:40PM 21 MET THEIR REQUIREMENTS, THEY PROBABLY WOULD SIGN THEM UP.
12:41PM 22 BUT THESE ARE CONTRACTS THAT WE'RE TALKING ABOUT. AND THEY'RE
12:41PM 23 NOT BEING ENFORCED.

12:41PM 24 THE COURT: IF SOME OF THESE CONTRACTORS ARE NOT
12:41PM 25 DOING WHAT THEY SHOULD BE, IS IT YOUR POSITION THAT THE STATE

12:41PM 1 SHOULD SEVER THEM FROM THE PROGRAM?

12:41PM 2 MS. SWANSON: IT IS OUR POSITION THAT THE STATE
12:41PM 3 NEEDS TO ENFORCE THE CONTRACTS. AND THAT WOULD BE A LAST
12:41PM 4 RESORT. WE DON'T WANT TO GET RID OF A LOT OF PHARMACIES.
12:41PM 5 WE JUST WANT KIDS TO GET WHAT THEY'RE LEGALLY ENTITLED TO.
12:41PM 6 SEVERING THEM WOULD BE A LAST RESORT. BUT IF THEY KNEW THERE
12:41PM 7 WAS A SERIOUS CHANCE OF THAT IF THEY DIDN'T COMPLY, MAYBE THERE
12:41PM 8 WOULD BE DIFFERENT ACTIVITY HERE. MAYBE IF THEY WERE PAID
12:41PM 9 ENOUGH THAT IT MADE SENSE FOR THEM TO COMPLY THERE WOULD BE A
12:41PM 10 DIFFERENT PATTERN OF ACTIVITY HERE. BUT RIGHT NOW WE DON'T
12:41PM 11 HAVE ANY OF THAT.

12:41PM 12 THE COURT: IF THE STATE IS REACHING OUT TO THE
12:41PM 13 PHARMACIES, IS WRITING LETTERS, MAKING PRESENTATIONS TO THEIR
12:41PM 14 INDUSTRY GROUP, PUTTING THINGS ON THEIR E-MAIL--I'M SORRY,
12:42PM 15 ON THEIR WEB SITE TO ALERT PHARMACIES AS TO WHAT THEIR
12:42PM 16 RESPONSIBILITIES ARE, PROVIDING AN OMBUDSMAN'S OFFICE, IF
12:42PM 17 THEY'RE DOING ALL OF THOSE THINGS AND THE PHARMACIES EITHER
12:42PM 18 AREN'T TAKING THE TIME TO ABSORB THE LETTERS THEY'RE GETTING
12:42PM 19 FROM THE STATE OR AREN'T INTERESTED IN READING THE LAW OR
12:42PM 20 TRYING TO UNDERSTAND THE ONLINE, 24-HOUR-A-DAY, SEVEN-DAY-A-WEEK
12:42PM 21 PREFERRED-PRESCRIPTION-DRUG SYSTEM, THEN WHAT SHOULD THE STATE
12:43PM 22 DO? SHOULD IT JUST SAY, "SORRY, YOU'RE APPARENTLY--ACCORDING
12:43PM 23 TO THE NUMBERS WE'RE SEEING, YOU'RE NOT FILLING ENOUGH 72-HOUR
12:43PM 24 SUPPLIES. WE JUST DON'T THINK THAT YOU UNDERSTAND OR THAT YOU
12:43PM 25 CARE TO UNDERSTAND. WE'RE NOT DOING BUSINESS WITH YOU

12:43PM 1 ANYMORE"? IS THAT WHAT THE STATE SHOULD DO? I DON'T KNOW
12:43PM 2 WHAT ELSE THEY CAN DO.

12:43PM 3 MS. SWANSON: I THINK THE STATE COULD ENFORCE ITS
12:43PM 4 CONTRACTS THROUGH A VARIETY OF MEANS, SUCH AS USE WITH OTHER
12:43PM 5 TYPES OF CONTRACTORS. I DON'T WANT TO PUT WORDS IN THE STATE'S
12:43PM 6 MOUTH ABOUT WHAT THEIR OPTIONS ARE, BUT THEY HAVE OPTIONS TO
12:43PM 7 ENFORCE CONTRACTS. AND THEY HAVE NOT EVEN BEGUN TO BE USED
12:43PM 8 HERE, AT LEAST FOR THE HMO'S. THEY SOMETIMES FINE THEM IF THEY
12:43PM 9 FIND THEM IN FLAGRANT VIOLATION OF WHAT THEY'RE SUPPOSED TO BE
12:43PM 10 DOING FOR THEIR ENROLLEES. WE DON'T SEE ANYTHING LIKE THAT
12:44PM 11 HERE, THAT WE'RE AWARE OF. AND I'M NOT ADVOCATING THAT FOR
12:44PM 12 ANY PARTICULAR INSTANCE EITHER. I THINK WE HAVE TO GIVE THESE
12:44PM 13 DEFENDANTS SOME DISCRETION, AND WE WANT THERE TO BE ENOUGH
12:44PM 14 PHARMACIES, BUT THEY'VE GOT TO DO SOMETHING TO ENFORCE THESE
12:44PM 15 CONTRACTS. THEY HAVE THE RIGHT AND THE OBLIGATION TO. AND
12:44PM 16 OUR CLIENTS ARE THE ONES WHO SUFFER WHEN THEY DON'T. AND THEY
12:44PM 17 AREN'T.

12:44PM 18 THE COURT: THANK YOU, MS. SWANSON.

12:44PM 19 MR. ECCLES, A QUICK RESPONSE?

12:44PM 20 MR. ECCLES: JUST A VERY QUICK RESPONSE, YOUR HONOR.
12:44PM 21 I'VE HEARD A LOT ABOUT SUFFERING AND PRESCRIPTIONS NOT BEING
12:44PM 22 FILLED AND MASSIVE NUMBERS OF THEM. I HAVEN'T REALLY SEEN
12:44PM 23 EVIDENCE OF THIS.

12:44PM 24 THE COURT: IS THERE SOME DISCUSSION OF THAT IN THE
12:44PM 25 DEPOSITIONS? ARE THEY DEPOSITIONS OR DECLARATIONS BY THESE

12:44PM 1 PHYSICIANS?

12:44PM 2 MR. ECCLES: THEY'RE BOTH, YOUR HONOR.

12:44PM 3 THE COURT: OKAY.

12:44PM 4 MR. ECCLES: AND WE CAN CERTAINLY TALK ABOUT THE
12:45PM 5 FOUR PHYSICIANS THAT MS. SWANSON PROFFERED AS WITNESSES TO TALK
12:45PM 6 ABOUT THEIR EXPERIENCES WITH SOME OF THEIR PATIENTS, AND WE
12:45PM 7 WILL IN THE MOTION TO STRIKE, BUT TO EXTRAPOLATE THAT TO A
12:45PM 8 STATEWIDE PANDEMIC OF UNFILLED PRESCRIPTIONS BASED ON THE FEAR
12:45PM 9 THAT THEY'RE NOT BEING FILLED IS REALLY NOT ONLY PUTTING THE
12:45PM 10 CART BEFORE THE HORSE, BUT IT'S DESTROYING SOMETHING FOR NO
12:45PM 11 APPARENT REASON. WE CAN'T BE--THE STATE CANNOT BE RESPONSIBLE
12:45PM 12 FOR QUELLING ANY FEAR THAT PLAINTIFFS' COUNSEL MAY HAVE THAT
12:45PM 13 THERE MAY BE SOME INDIVIDUALS GOING TO A PHARMACY THAT'S NOT
12:45PM 14 DOING EXACTLY WHAT THEY'RE SUPPOSED TO DESPITE THE FACT THAT
12:45PM 15 THERE IS LITERALLY A MESSAGE IN FRONT OF THE PHARMACIST, SAYING
12:46PM 16 "GIVE THEM A 72-HOUR SUPPLY, AND HERE'S WHAT WE'LL PAY YOU."

12:46PM 17 I DON'T KNOW WHAT ELSE WE'RE SUPPOSED TO DO. IF
12:46PM 18 YOU ACTUALLY LOOK AT THE RELIEF THAT THE PLAINTIFF IS SEEKING,
12:46PM 19 THEY DON'T OFFER ANY. THEY ASK YOU TO ORDER US TO THINK OF
12:46PM 20 SOMETHING TO DO DESPITE THE FACT WE THINK WE'VE DONE IT. AND
12:46PM 21 THEY HAVEN'T PLEADED OR SHOWN ANY BASIS FOR RELIEF, WHICH I
12:46PM 22 BELIEVE WOULD ESSENTIALLY BE--IF THE--NOW THEY'RE SAYING THAT
12:46PM 23 THEY'RE TRYING TO ENFORCE THE CONSENT DECREE, PARAGRAPH 3,
12:46PM 24 AGAINST THE STATE, BY THEIR MOTION TO ENFORCE THE CORRECTIVE
12:46PM 25 ACTION ORDER.

12:46PM 1 WE REALLY HAVE NOT SEEN CONTEMPT LEVELS OF BEHAVIOR
12:46PM 2 FROM THE STATE ON ANY PARAGRAPH, MUCH LESS TWO THAT I FIND IT
12:47PM 3 DIFFICULT TO BELIEVE CONTAIN ENFORCEABLE PROVISIONS. BUT WE
12:47PM 4 HAVE CERTAINLY NOT SEEN ANY EVIDENCE TO OVERCOME WHAT WE HAVE
12:47PM 5 SHOWN, AND THAT IS THE SATISFACTION OF WHAT ARE VERY BASIC--
12:47PM 6 VERY BASIC CORRECTIVE ORDER ACTION PROVISIONS. I DON'T BELIEVE
12:47PM 7 IN ALL OF THE 11 THERE'S ANY MORE STRAIGHTFORWARD CORRECTIVE
12:47PM 8 ACTION ORDER THAN THIS ONE. AND IF WE COULDN'T AGREE ON A
12:47PM 9 SINGLE ONE OF THESE BULLET POINTS COMING INTO THIS HEARING,
12:47PM 10 I'M DISHEARTENED.

12:47PM 11 THE COURT: WELL, NO, MS. SWANSON DOES AGREE THAT
12:47PM 12 YOU HAVE COMPLIED WITH MANY OF THESE BULLET POINTS.

12:47PM 13 MR. ECCLES: HERE WE ARE, THOUGH, JUDGE, AFTER A
12:47PM 14 YEAR OF BRIEFING.

12:47PM 15 THE COURT: I MEAN, WE'RE DOWN TO TWO.

12:48PM 16 MR. ECCLES: WHY DIDN'T THEY AGREE TO THAT A YEAR
12:48PM 17 AGO?

12:48PM 18 THE COURT: I DON'T KNOW. THAT'S THE FIRST THING
12:48PM 19 I'M GOING TO ASK IS, WHAT CAN I NARROW IT DOWN TO? THAT WILL
12:47PM 20 TAKE ABOUT 10 MINUTES.

12:47PM 21 MR. ECCLES: I APOLOGIZE FOR MY OUTBURST. THAT WAS
12:47PM 22 UNPROFESSIONAL OF ME. AND IF WE WOULD LIKE TO ROLL ON TO THE
12:48PM 23 MOTION TO STRIKE, PERHAPS WE CAN--

12:48PM 24 THE COURT: I WILL ASK YOU THAT ON FUTURE CAO'S THAT
12:48PM 25 ARE CHALLENGED OR SOUGHT TO BE ENFORCED BY THE PLAINTIFFS THAT

12:48PM 1 YOU DO DISCUSS WHAT THE REAL BULLET POINTS AT ISSUE ARE. I
12:48PM 2 DON'T HAVE MY COPY OF ALL THE CAO'S. ARE THEY ALL BULLET-POINT
12:48PM 3 TYPE CAO'S?

12:48PM 4 MR. ECCLES: YES, THEY ARE. AND THEY ALL HAVE A
12:48PM 5 CONFERENCE PERIOD.

12:48PM 6 THE COURT: OKAY. IN THE CONFERENCE PERIOD, YOU
12:48PM 7 SHOULD TRY TO COME TO SOME AGREEMENT ON WHICH OF THOSE
12:48PM 8 PARAGRAPHS THE COURT SHOULD FOCUS.

12:48PM 9 MR. ECCLES: WE WILL CONTINUE THOSE EFFORTS.

12:48PM 10 THE COURT: THIS HEARING HAS BEEN VERY HELPFUL TO ME
12:48PM 11 IN NARROWING THIS DOWN AND GETTING A PICTURE OF WHERE I NEED TO
12:48PM 12 GO TO READ. MY PROBLEM IS FINDING TIME TO READ ON CIVIL CASES.
12:49PM 13 I SPEND MOST OF MY TIME ON CRIMINAL CASES. I'M IN THE COURTROOM
12:49PM 14 TWICE AS MUCH AS THE AVERAGE. AND SO IT PRESENTS A PROBLEM IN
12:49PM 15 FINDING THE TIME IN MY OFFICE. I'M NOT THERE. I'M USUALLY
12:49PM 16 OUT HERE OR I'M READING TO GET READY TO COME OUT HERE ON A
12:49PM 17 CRIMINAL CASE.

12:49PM 18 BUT THIS HEARING HAS BEEN HELPFUL BECAUSE I KNOW
12:49PM 19 WHAT EXHIBITS TO GO TO TO LOOK TO SEE WHAT THE STATE FEELS IT
12:49PM 20 HAS DONE TO COMPLY WITH THE BULLET POINTS IN THE CORRECTIVE
12:49PM 21 ACTION ORDER, WHICH THE STATE FEELS WOULD ALSO BE EVIDENCE OF
12:49PM 22 COMPLIANCE WITH THE DECREE. AND MS. SWANSON HAS GIVEN ME
12:49PM 23 CITES TO DIFFERENT EXHIBITS THAT I NEED TO LOOK AT THAT SHE
12:49PM 24 FEELS DEMONSTRATE HER POSITION THAT, REGARDLESS OF WHAT THE
12:49PM 25 STATE IS DOING, IT'S NOT ENOUGH. I THINK THE PLAINTIFFS'

12:49PM 1 POSITION IS: NO MATTER WHAT THE STATE HAS DONE, IT'S SIMPLY
12:50PM 2 NOT ENOUGH AND YOU NEED TO COME UP WITH SOME IDEAS AS TO WHAT
12:50PM 3 MORE TO DO.

12:50PM 4 SO I NEED TO LOOK AT WHAT YOU'VE DONE AND SEE IF
12:50PM 5 IT APPEARS TO ME YOU'VE DONE WHAT'S REASONABLE TO DO AND
12:50PM 6 THAT YOU'VE COMPLIED WITH AT LEAST THE BULLET POINTS AND
12:50PM 7 THE PARAGRAPHS IN THE DECREE WE'VE NARROWED THIS DOWN TO.

12:50PM 8 MR. ECCLES: I'M HAPPY WITH THAT PROCESS. I'LL JUST
12:50PM 9 THROW IN A QUICK REBUTTAL FOR THE STATE THAT THERE'S NO CONSENT
12:50PM 10 DECREE THAT'S EVER BEEN FOUND TO BE LIMITED ON ITS TERMS TO
12:50PM 11 THE USE OF THE WORD "WILL." I HAVEN'T READ TOO MANY CONSENT
12:50PM 12 DECREES. AND I HOPE, WITH GOD AS MY WITNESS, TO NEVER BE A
12:50PM 13 PART OF ANOTHER ONE. BUT I DON'T KNOW OF ANOTHER ONE THAT
12:50PM 14 EXPRESSLY SAYS SO IN ONE OF ITS PARAGRAPHS.

12:50PM 15 WE HAVE TO LOOK AT THE TERMS OF THE CONSENT DECREE.
12:50PM 16 IF ONE OF THEM IS THAT "WILL" CONTAINS AN ENFORCEABLE PROVISION,
12:51PM 17 AS IT DOES IN WHICH PARAGRAPH 3--

12:51PM 18 THE COURT: YEAH, THE TERM "WILL" CREATES A
12:51PM 19 MANDATORY ENFORCEABLE OBLIGATION, AND THE TERM "WILL" IS
12:51PM 20 USED IN PARAGRAPHS 129 AND 130.

12:51PM 21 MR. ECCLES: IT IS.

12:51PM 22 THE COURT: AND THAT'S WHY I WENT THROUGH--

12:51PM 23 MR. ECCLES: EXACTLY--

12:51PM 24 THE COURT: --WHAT IS REQUIRED OF THE STATE IN
12:51PM 25 PARAGRAPH 129. IT APPEARS THAT--I THINK MS. SWANSON WENT

12:51PM 1 THROUGH THIS EVALUATION THAT THE STATE HAS DONE OF PHARMACISTS'
12:51PM 2 KNOWLEDGE OF THE EPSDT COVERAGE. SHE WAS SHOWING ME THE
12:51PM 3 PERCENTAGES THAT SAY, YES, THEY UNDERSTAND, AND THE ONES THAT
12:52PM 4 SAY, NO, THEY DON'T UNDERSTAND. SO YOU'VE DONE THAT.

12:52PM 5 MR. ECCLES: YES.

12:52PM 6 THE COURT: OKAY.

12:52PM 7 AND YOU'VE DONE THE THINGS THAT ARE LISTED IN
12:52PM 8 PARAGRAPH 129.

12:52PM 9 AND YOU MAY HAVE DONE EVERYTHING YOU ARE SUPPOSED
12:52PM 10 TO DO FOR THE TWO BULLET POINTS. I JUST NEED TO LOOK AT THESE
12:52PM 11 EXHIBITS.

12:52PM 12 SO THEN IT REALLY KIND OF BOILS DOWN TO: DOES THAT
12:52PM 13 APPEAR TO THE COURT TO BE A GENUINE BONA FIDE GOOD-FAITH EFFORT
12:52PM 14 BY THE STATE TO DO EVERYTHING IT CAN TO EDUCATE PHARMACISTS WHO
12:52PM 15 ON SOME OCCASIONS ARE NOT UNDERSTANDING WHAT THEY'RE SUPPOSED
12:52PM 16 TO DO?

12:52PM 17 MR. ECCLES: EVERY FIBER OF MY BEING WANTS TO NOD
12:52PM 18 ALONG WITH YOU, YOUR HONOR, BUT I THINK THAT'S A LITTLE MUCH
12:52PM 19 TO ASK OF THE STATE TO MAKE A DETERMINATION BASED ON "HAS THE
12:52PM 20 STATE DONE EVERYTHING IN ITS POWER TO DO SOMETHING?" I THINK
12:52PM 21 THAT IT NEEDS TO DO EVERYTHING IT AGREED TO DO, AND THAT'S MERE
12:53PM 22 SATISFACTION UNDER THE ORDER--

12:53PM 23 THE COURT: I DIDN'T SAY "EVERYTHING IN ITS POWER."

12:53PM 24 MR. ECCLES: I'M SORRY.

12:53PM 25 THE COURT: I SAID, "DOES IT APPEAR TO THE COURT TO

12:53PM 1 BE A GENUINE BONA FIDE GOOD-FAITH EFFORT BY THE STATE TO DO
12:53PM 2 EVERYTHING IT CAN TO EDUCATE PHARMACISTS." YOU ARE OBJECTING
12:53PM 3 TO MY USE OF THE WORD "EVERYTHING."

12:53PM 4 MR. ECCLES: YES.

12:53PM 5 THE COURT: MAYBE I'M OVERBROAD THERE. BUT DOES IT
12:53PM 6 LOOK LIKE TO ME THE STATE HAS DONE WHAT IT SHOULD TO EDUCATE
12:53PM 7 PHARMACISTS? IT SEEMS TO ME THAT'S WHAT THIS IS ABOUT.

12:53PM 8 MR. ECCLES: INDEED.

12:53PM 9 SHALL WE MOVE ON TO THE MOTION TO STRIKE? I THINK
12:53PM 10 THAT I CAN DO IT QUICKLY.

12:53PM 11 THE COURT: LET'S TAKE A BREAK. IT IS ALMOST 1:00.
12:53PM 12 I DON'T KNOW WHAT YOUR TRAVEL PLANS ARE. DO YOU WANT TO GO TO
12:53PM 13 LUNCH AND COME BACK? I NEED TO GIVE MR. KELLEY A BREAK. IT IS
12:54PM 14 1:00. DO YOU HAVE PLANE RESERVATIONS SHORTLY?

12:54PM 15 MS. SWANSON: NO, YOUR HONOR; WE DROVE.

12:54PM 16 THE COURT: I'VE FORGOTTEN, MS. SWANSON. WHERE ARE
12:54PM 17 YOU COMING FROM?

12:54PM 18 MS. SWANSON: I'M COMING FROM THE WOODLANDS, JUST
12:54PM 19 NORTH OF HOUSTON.

12:54PM 20 THE COURT: YOU ARE COMING FROM NACOGDOCHES?

12:54PM 21 MR. GARRIGAN: NACOGDOCHES.

12:54PM 22 THE COURT: OKAY.

12:54PM 23 MR. ECCLES: THE STATE IS CARPOOLING FROM AUSTIN.

12:54PM 24 THE COURT: OKAY. HOW ABOUT IF WE GO TO LUNCH?
12:54PM 25 WILL THAT BE OKAY? ALL RIGHT. LET'S TAKE--I KNOW YOU DON'T

12:54PM 1 LIVE HERE, SO LET'S TAKE AN HOUR AND 15 MINUTES FOR LUNCH. LET
12:54PM 2 ME SEE YOU BACK AT 2:15. THANK YOU. WE'LL RECESS UNTIL 2:15.
12:54PM 3 THANK YOU.

12:54PM 4 MS. SWANSON: THANK YOU, YOUR HONOR.

12:54PM 5 [LUNCH RECESS]

02:19PM 6 THE COURT: THANK YOU. PLEASE TAKE YOUR SEATS.

02:19PM 7 MS. SWANSON: YOUR HONOR, COULD I PLEASE HAVE JUST
02:19PM 8 ONE MINUTE TO RESPOND TO THE COURT'S REMARK ABOUT DECREE
02:19PM 9 INTERPRETATION JUST BEFORE THE BREAK?

02:19PM 10 THE COURT: ALL RIGHT.

02:19PM 11 MS. SWANSON: THANK YOU.

02:19PM 12 FIRST, THE COURT HAS HELD IN THIS CASE, IN THE
02:19PM 13 2000 OPINION, THAT DECREE PARAGRAPHS 3 AND 190 ARE DEFINITELY
02:19PM 14 ENFORCEABLE, THEY CONVEY ENFORCEABLE OBLIGATIONS. AND THOSE
02:19PM 15 ARE FROM THE 2000 OPINION, PAGES 611, 630 AND NOTE 106. AND
02:19PM 16 ALSO 674 AND 75.

02:19PM 17 SECONDLY, THE LAW OF DECREE INTERPRETATION IS CLEAR
02:19PM 18 IN ALL CIRCUITS THAT THE DECREE MUST BE READ TOGETHER. THAT IS
02:20PM 19 BASIC CONTRACT PRINCIPLE. IT'S ALSO THE CASE LAW THAT WE'VE
02:20PM 20 CITED IN OUR RESPONSE TO DEFENDANTS' RULE 60(B)(5) MOTION ON
02:20PM 21 PAGES 2 AND 3. AND IT'S THE LAW OF THIS CASE. IT'S DISCUSSED
02:20PM 22 IN THE 2000 OPINION ON PAGES 595 TO 96. THANK YOU, YOUR HONOR.

02:20PM 23 THE COURT: ALL RIGHT. NOW, WAIT A MINUTE. THE
02:20PM 24 COURT'S 2000 OPINION--WHAT IS THE TITLE OF THAT OPINION?

02:20PM 25 MS. SWANSON: IT IS FREW VERSUS GILBERT, 109

02:20PM 1 F.SUPP.2D 579.

02:20PM 2 THE COURT: AND YOU'VE CITED ME TO PAGES 611, 630,
02:20PM 3 674, 675 AND WHAT OTHER PAGES?

02:20PM 4 MS. SWANSON: 595 AND 596, YOUR HONOR.

02:20PM 5 THE COURT: AND THAT'S WITH RESPECT TO PARAGRAPHS 3
02:20PM 6 AND 190 OF THE DECREE?

02:21PM 7 MS. SWANSON: AND WITH RESPECT TO HOW THE DECREE'S
02:21PM 8 PARAGRAPHS SHOULD BE READ TOGETHER TO FORM THEIR MEANING,
02:21PM 9 RATHER THAN IN ISOLATION.

02:21PM 10 THE COURT: OKAY.

02:21PM 11 MR. ECCLES, I THINK YOU WERE GOING TO ADDRESS YOUR
02:21PM 12 MOTION TO STRIKE.

02:21PM 13 MR. ECCLES: I WILL. I WOULD BE REMISS IF I DIDN'T
02:21PM 14 JUST TOSS IN, SINCE SHE'S NOW BROUGHT THIS UP, LAW-OF-THE-CASE
02:21PM 15 DOCTRINE, AS WE HAVE BRIEFED IN ONE OF OUR MANY BRIEFS ON THIS,
02:21PM 16 IS A PRINCIPLE THAT DEALS WITH PRE-JUDGMENT. WE'RE POST-
02:21PM 17 JUDGMENT NOW. WE'RE IN 60(B)(5). AND IT'S PERFECTLY
02:21PM 18 REASONABLE FOR THIS COURT, MEANING YOU, TO LOOK AT AN ORDER
02:21PM 19 IN A CASE THAT HAS BEEN TRANSFERRED TO YOU AND MAKE WHATEVER
02:22PM 20 JUDGMENT YOU SEE FIT. THERE'S NOTHING THAT PRECLUDES YOU FROM
02:22PM 21 DOING THAT. AND THE RULINGS BY JUDGE JUSTICE ON THAT ISSUE 13
02:22PM 22 YEARS AGO, HE DIDN'T RULE ON PARAGRAPHS 3 AND 190 IN ISOLATION.
02:22PM 23 HE CLUMPED THEM TOGETHER WITH OTHER PARAGRAPHS THAT DID CONTAIN
02:22PM 24 THE WORD "WILL," AND FOUND THEM SORT OF LOOSELY TO BE
02:22PM 25 ENFORCEABLE. SO IT'S UP TO YOU HOW YOU READ THIS CONSENT

02:22PM 1 DECREE, WHICH INCLUDES PARAGRAPH 302 THAT TALKS ABOUT "WILL"
02:22PM 2 AS AN ENFORCEABLE PARAGRAPH.

02:22PM 3 SO, THAT SAID, I WILL GO INTO THE MOTION TO STRIKE.
02:22PM 4 BUT MY LITTLE SORT OF CLEAN-UP FROM THIS MORNING, ONE OF THE
02:22PM 5 THINGS THAT I SAID RIGHT AT THE END, AND I TOOK A LITTLE BIT
02:22PM 6 OF--I DON'T WANT TO SAY "OFFENSE," BUT MY EARS PERKED UP AT
02:23PM 7 A WORD THAT YOU USED, AND I REALIZED WHEN ONE OF THE COUNSEL
02:23PM 8 INFORMED ME THAT "SUBSTANTIAL COMPLIANCE" IS WHAT THE STATE
02:23PM 9 HAS TO ACHIEVE. THAT IS ITS SATISFACTION TERM. SO WHEN WE'RE
02:23PM 10 TALKING ABOUT "WHAT DOES THE STATE HAVE TO SHOW," WE GO TO THE
02:23PM 11 CONTRACT LAW OF THE STATE. IN TEXAS, THAT WOULD BE SUBSTANTIAL
02:23PM 12 COMPLIANCE WITH THE TERMS OF THE CORRECTIVE ACTION ORDER.
02:23PM 13 THAT IS WHAT THE STATE IS SHOOTING FOR. AND WE ABSOLUTELY
02:23PM 14 HAVE DEMONSTRATED THAT TO THE COURT.

02:23PM 15 VERY BRIEFLY, ON THE POINTS THAT MS. SWANSON MADE AS
02:23PM 16 TO THE INDIVIDUAL PATIENT COMPLAINTS THAT HAVE BEEN VOICED BY
02:23PM 17 HER DOCTOR WITNESSES AS WELL AS THROUGHOUT THEIR BRIEFING, I
02:23PM 18 WOULD DIRECT THE COURT, IF IT IS AT ALL INTERESTED ON THOSE
02:24PM 19 POINTS, TO THE DECLARATION OF LORETTA DISNEY. IT GOES THROUGH
02:24PM 20 IN PAINSTAKING INDIVIDUAL DETAIL BEGINNING AT PAGE 4--THIS IS
02:24PM 21 EXHIBIT 11 IN THE DEFENDANTS' EXHIBITS--PATIENT BY PATIENT
02:24PM 22 THAT GETS NAMED, INCIDENT BY INCIDENT, TO SHOW THAT THERE IS NO
02:24PM 23 ACTUAL HARM THAT HAS OCCURRED TO THESE PATIENTS. IT'S JUST NOT
02:24PM 24 THERE.

02:24PM 25 AND AS TO PACKETS THAT WERE SENT TO PHARMACISTS,

02:24PM 1 THAT WOULD BE THE 72,000, I JUST WOULD LIKE TO DIRECT THE COURT
02:24PM 2 TO EXHIBIT 2, ATTACHMENT 3. IT'S NOT IN THE BIG COMPENDIUM OF
02:24PM 3 EXHIBIT 1, IT'S ACTUALLY EXHIBIT 2. ATTACHMENT 3 CONTAINS THAT
02:25PM 4 INFORMATION WHICH WILL HAVE SOME OF THE INFORMATION THAT YOU
02:25PM 5 ARE LOOKING FOR IN SATISFACTION OF DECREE PARAGRAPH 129.

02:25PM 6 THE MOTION TO STRIKE. I WILL GO THROUGH THIS VERY
02:25PM 7 QUICKLY. IT IS A TOUCHY SUBJECT, AND I WANT TO MAKE CLEAR
02:25PM 8 WE'RE NOT SEEKING TO STRIKE THEIR TESTIMONY. IT'S FOUR DOCTORS
02:25PM 9 WHO SEE MEDICAID PATIENTS. AND WE CERTAINLY DON'T WANT TO
02:25PM 10 DISPARAGE OR TAKE ANY SORT OF STANCE THAT WE HAVE A CONTEST
02:25PM 11 WITH THE MEDICAL JUDGMENT OR THE TREATMENT THAT THESE DOCTORS
02:25PM 12 HAVE PROVIDED.

02:25PM 13 THE PROBLEM IS THAT IN THIS CASE, THAT'S NOT WHAT
02:25PM 14 THEY'RE TESTIFYING ABOUT. THIS ISN'T A CASE WHERE WE HAVE
02:25PM 15 A CHILD WHO HAS BEEN INJURED BY A PHYSICIAN'S CARE AND THEY
02:25PM 16 NEED AN EXPERT WITNESS TO COME IN AND TALK ABOUT STANDARDS
02:26PM 17 AND DUTIES OF CARE AND WHAT A DOCTOR SHOULD HAVE DONE.

02:26PM 18 THIS IS A CASE WHERE WE HAVE FOUR DOCTORS WHO ARE
02:26PM 19 TALKING ABOUT THINGS THEY'VE SEEN IN THEIR PRACTICE. THAT'S
02:26PM 20 WHAT FACT WITNESSES DO. WE HAVEN'T BROUGHT EXPERTS, WE'VE
02:26PM 21 BROUGHT FACT WITNESSES. BUT THE PROBLEM HERE IS, THEY'RE
02:26PM 22 TALKING ABOUT BROAD-SWEEPING GENERALIZATIONS AND THEY'RE USING
02:26PM 23 AN EXPERT WITNESS'S ABILITY TO BRING IN HEARSAY TO TALK ABOUT
02:26PM 24 WHAT OTHER DOCTORS IN THEIR OFFICE HAVE SEEN AND WHAT THEIR
02:26PM 25 ASSISTANTS--THEIR OFFICE ASSISTANTS HAVE SAID ON THE PHONE.

BEFORE THIS COURT IS THE QUESTION OF WHETHER THE STATE HAS COMPLIED WITH A NUMBER OF STUDY AND INSTRUCTIONAL ISSUES AS TO PHARMACISTS. AND WE SEE--I THINK IT WAS QUOTED PROBABLY ONE TOO MANY TIMES IN OUR MOTION TO STRIKE--THE FIFTH CIRCUIT STANDARD THAT WITHOUT MORE THAN CREDENTIALS AND A SUBJECTIVE OPINION, AN EXPERT'S OPINION THAT IT IS SO IS NOT ADMISSIBLE.

HERE WE HAVE, CERTAINLY QUALIFIED TO PRACTICE MEDICINE, THESE FOUR INDIVIDUALS. BUT ARE THEY QUALIFIED TO OPINE ABOUT THE STATE OF MEDICAID, GENERALLY, STATEWIDE? ARE THEY QUALIFIED TO TALK ABOUT THIS CORRECTIVE ACTION ORDER AS EXPERTS?

HERE, THE STATE EITHER COMPLETED THE TERMS OF THE CORRECTIVE ACTION ORDER OR IT DIDN'T. AND WE CAN TELL IMMEDIATELY THAT THESE FOUR INDIVIDUAL DOCTORS ARE NOT EXPERTS IN WHETHER THE STATE COMPLIED WITH THIS CORRECTIVE ACTION ORDER RIGHT OFF THE BAT FROM THE VERY FACT THAT NONE OF THESE WITNESSES HAD EVEN READ THE CORRECTIVE ACTION ORDER OR THE RELEVANT CONSENT DECREE PARAGRAPHS.

GOING FURTHER, NONE OF THEM HAD DEVELOPED ANY STUDIES, NONE OF THEM HAD DONE ANY RESEARCH, REVIEWED ANY DATA OF STATEWIDE EVIDENCE, NONE OF THEM PROVIDED A REPORT.

THEY SIMPLY WERE ASKED BY PLAINTIFFS' COUNSEL WHAT PROBLEMS THEY HAD ENCOUNTERED WITH MEDICAID PRESCRIPTIONS. NOW, THAT'S FINE, THAT'S THEIR OPINION, BUT IT IS, IN THIS

02:28PM 1 CONTEXT, A LAY OPINION.

02:28PM 2 THEY MADE CONCLUSORY STATEMENTS ABOUT MEDICAID. AND
02:28PM 3 HERE'S THE DANGER OF TAKING THIS KIND OF EVIDENCE: YOU TAKE
02:28PM 4 FOUR DOCTORS WHO HAVE BEEN CONTACTED BY PLAINTIFFS' COUNSEL
02:28PM 5 AND THEY LAY OUT, YOU KNOW, 15 OR SO ANECDOTES BETWEEN THEM OF
02:28PM 6 THINGS THEY'VE SEEN. WE CAN'T EVEN STATISTICALLY EXTRAPOLATE
02:28PM 7 THAT TO THE ENTIRE MEDICAID CLASS. BUT THAT'S EXACTLY WHAT
02:29PM 8 THEY'RE ASKING YOU TO DO. IF FOUR DOCTORS ALL OVER THE STATE
02:29PM 9 SAY THEY'VE SEEN SOMETHING, IS THIS COURT SUPPOSED TO TAKE THAT
02:29PM 10 AS EVIDENCE THAT THE ENTIRE MEDICAID CLASS IS SUFFERING FROM
02:29PM 11 SOMETHING? THAT IS THE IMPROPER EXTRAPOLATION THAT'S BEING
02:29PM 12 DONE HERE AND THAT'S WHY IT IS IMPROPER TO ACTUALLY CLOAK
02:29PM 13 THEM WITH THE AUTHORITY AS EXPERT WITNESSES.

02:29PM 14 AND I'M NOT HERE TO SAY YOU SHOULDN'T EVEN LOOK
02:29PM 15 AT THEM. LET THEM OFFER THEIR OPINION, THAT'S FINE. AND IF
02:29PM 16 DOCTORS WANT TO SAY, "HERE'S SOMETHING I'VE SEEN," THAT'S FINE,
02:29PM 17 TOO.

02:29PM 18 WE'RE ASKING YOU TO STRIKE THEM AS EXPERTS. AT THAT
02:29PM 19 POINT, AS LAY WITNESSES, YOU HAVE DECLARATIONS BEFORE YOU. WE
02:29PM 20 CERTAINLY THINK THE COURT IS CAPABLE OF SAYING, "OKAY, HERE IS
02:29PM 21 SOMEBODY WHO IS OFFERING THEIR LAY OPINION ON A SUBJECT." I'M
02:30PM 22 NOT GOING TO SPEAK FOR YOU. THE COURT IS CERTAINLY CAPABLE OF
02:30PM 23 THEN SAYING, "THIS IS A HEARSAY STATEMENT THAT'S INADMISSIBLE,
02:30PM 24 THIS IS A CONCLUSORY STATEMENT THAT IS INADMISSIBLE. THIS
02:30PM 25 PERSON IS NOT AN EXPERT IN THIS AREA. THEREFORE, THE HEARSAY

02:30PM 1 OF THESE CONCLUSIONS THAT THEY'RE MAKING AND THE PEOPLE THAT
02:30PM 2 THEY'RE SPEAKING FOR AND 'MY COLLEAGUE SAID THIS' AND 'MY
02:30PM 3 OFFICE ASSISTANT SAID THAT,' " YOU'RE NOT GOING TO LOOK AT THAT.

02:30PM 4 I DISAGREE PERSONALLY WITH THE PLAINTIFFS' TACTIC OF
02:30PM 5 SEEKING OUT DOCTORS AND ASKING THEM TO GENERALLY GRIPE ABOUT
02:30PM 6 MEDICAID AS A WAY OF ATTEMPTING TO INSINUATE EXPERT TESTIMONY
02:30PM 7 INTO THIS CASE, BUT BY THE SAME TOKEN WE DON'T WANT TO DISSUADE
02:30PM 8 EVERYONE FROM VOICING THEIR PERSONAL OPINIONS.

02:30PM 9 THE COURT: IS THE TESTIMONY BY THESE PHYSICIANS
02:31PM 10 TESTIMONY ABOUT THEIR EXPERIENCE WITH THE PRESCRIPTION-DRUG
02:31PM 11 SYSTEM AND TRYING TO PRESCRIBE AND HAVING PROBLEMS WITH
02:31PM 12 PHARMACISTS FILLING THE PRESCRIPTION? IS THAT WHAT IT'S ABOUT?

02:31PM 13 MR. ECCLES: SOME OF THAT TESTIMONY IS TO THAT--
02:31PM 14 TO THAT--TO THAT ISSUE. HOWEVER, AGAIN, THAT WOULD BE A FACT
02:31PM 15 WITNESS TESTIFYING. "HERE'S MY EXPERIENCE WITH THIS." THAT
02:31PM 16 DOCTOR IN SAN ANGELO CAN'T SPEAK FOR EVERY MANAGED-CARE
02:31PM 17 ORGANIZATION THAT COULD BE IMPACTED. AS A MATTER OF FACT,
02:31PM 18 THE DOCTOR IN SAN ANGELO HAD A PROBLEM WITH A PARTICULAR
02:31PM 19 MANAGED-CARE ORGANIZATION BUT REFERRED HER PATIENTS TO OTHER
02:31PM 20 MANAGED-CARE ORGANIZATIONS, WHICH IF YOU ARE INSURED, YOU
02:31PM 21 CAN'T DO. BUT IF YOU ARE ON MEDICAID, YOU CAN ACTUALLY SWITCH
02:31PM 22 BETWEEN MANAGED-CARE ORGANIZATIONS. BUT THAT'S SAN ANGELO AND
02:31PM 23 THAT DOCTOR. IS THAT A STATEWIDE ISSUE OR IS IT THIS DOCTOR
02:32PM 24 AND THIS MANAGED-CARE ORGANIZATION? IS IT THE DOCTOR IN
02:32PM 25 SAN ANGELO WHO IS HAVING TROUBLE HAVING A PRESCRIPTION FOR

02:32PM 1 PSYCHOACTIVE DRUGS FILLED BECAUSE OF AN IMPROPER PROCEDURE OR
02:32PM 2 BECAUSE SHE'S PRESCRIBING IT AT A LEVEL OR A DOSAGE THAT'S TOO
02:32PM 3 HIGH? THAT'S WHY WE CAN'T TAKE THEIR PERSONAL EXPERIENCES
02:32PM 4 STANDING ON THEIR OWN TO REALLY MEAN ANYTHING. WE CERTAINLY
02:32PM 5 CAN'T TAKE IT AS EXPERT TESTIMONY IN THIS INSTANCE, BECAUSE
02:32PM 6 THEY HAVEN'T ACTUALLY QUALIFIED THEMSELVES AS CAPABLE OF
02:32PM 7 SPEAKING IN AN EXPERT FASHION THAT WE CAN TRUST THEIR
02:32PM 8 CONCLUSIONS. IT'S NOT BASED ON ANY SORT OF SCIENTIFIC
02:32PM 9 DERIVATION OR ANY SYSTEMATIC APPROACH THAT COULD BE REPRODUCED,
02:32PM 10 FOR INSTANCE.

02:32PM 11 THE COURT: IS IT BASED ON SPECIALIZED KNOWLEDGE?

02:32PM 12 MR. ECCLES: IT'S BASED ON PARTICULAR KNOWLEDGE.
02:32PM 13 IT'S NO MORE SPECIALIZED KNOWLEDGE THAN I COULD TESTIFY ABOUT
02:32PM 14 WHAT I JUST SAW WHEN I WENT OUTSIDE. THAT'S SPECIALIZED
02:33PM 15 KNOWLEDGE BECAUSE I SAW IT, BUT I COULD GO OUTSIDE AND SAY,
02:33PM 16 "THERE ARE THREE RED CARS THAT DROVE BY THAT ARE RED; ERGO,
02:33PM 17 I THINK ALL THE CARS IN THE STATE ARE RED."

02:33PM 18 THE COURT: THIS WHOLE ISSUE IS ABOUT CAO 637-8,
02:33PM 19 WHICH HAS TO DO WITH PRESCRIPTION AND NONPRESCRIPTION
02:33PM 20 MEDICATIONS AND REALLY HAS TO DO WITH TRAINING AND EDUCATING
02:33PM 21 PHARMACISTS.

02:33PM 22 MR. ECCLES: YES.

02:33PM 23 THE COURT: SO THESE PHYSICIANS ARE NOT TALKING
02:33PM 24 ABOUT ANY PROBLEMS THEY PERSONALLY HAVE HAD WITH BILLING
02:33PM 25 MEDICAID OR ANYTHING LIKE THAT, THEY'RE TALKING ABOUT

02:33PM 1 PROBLEMS IN WRITING PRESCRIPTIONS AND RUNNING INTO, I DON'T
02:33PM 2 KNOW, ROADBLOCKS OR SOMETHING WHERE THE PATIENT IS NOT GETTING
02:33PM 3 THE MEDICINE?

02:33PM 4 MR. ECCLES: SOMETIMES. OR IT'S SOME THINGS THAT
02:33PM 5 THEY'VE HEARD FROM ANOTHER DOCTOR IN THEIR OFFICE.

02:34PM 6 THE COURT: ABOUT PROBLEMS WITH THE SYSTEM? THE
02:34PM 7 ONLINE SYSTEM MAYBE?

02:34PM 8 MR. ECCLES: MORE PROBLEMS THAT THEIR ASSOCIATE
02:34PM 9 ENCOUNTERED WITH A PATIENT THAT THEY'RE COMING BACK AND ASKING
02:34PM 10 FOR PRIOR APPROVAL, THINGS LIKE THAT.

02:34PM 11 THE COURT: DOES THAT NOT INVOLVE SOME TYPE OF
02:34PM 12 SPECIALIZED KNOWLEDGE?

02:34PM 13 MR. ECCLES: NOT IN THE SENSE THAT WE'RE TALKING
02:34PM 14 ABOUT SPECIALIZED KNOWLEDGE FROM WHICH WE CAN DRAW CONCLUSIONS.
02:34PM 15 IT IS STILL FIRMLY WITHIN THE BOUNDS OF THINGS THAT A FACT
02:34PM 16 WITNESS WOULD TALK ABOUT. AND TO THE EXTENT THAT WE'RE EVEN
02:34PM 17 TALKING ABOUT, YOU KNOW, WHAT THE PERSON DID, WHAT THE PERSON
02:34PM 18 SAW, IF WE'RE TRYING TO DRAW CONCLUSIONS ABOUT WHAT THAT MEANS
02:34PM 19 IN A STATEWIDE SYSTEM, THEY HAVE NO DATA, NO RESEARCH AND
02:34PM 20 NO EXPERIENCE. NONE OF THESE FOLKS EVEN HAD EXPERIENCE IN
02:34PM 21 DEVELOPING POLICY OR RUNNING A STATEWIDE PROGRAM. IT'S NOT
02:35PM 22 THAT YOU HAVE TO HAVE THAT TYPE OF SPECIALIZED EXPERIENCE,
02:35PM 23 BUT YOU AT THE VERY LEAST HAVE TO HAVE THE BACKGROUND TO HAVE
02:35PM 24 RESEARCHED SOME NUMBERS, HAVE TAKEN SOME DATA AND CRUNCHED IT
02:35PM 25 DOWN AND SAY, "HERE'S WHAT I TAKE FROM THESE NUMBERS." AS A

02:35PM 1 MATTER OF FACT, MS. SWANSON EVEN SAID THAT SHE HAD--SHE TOOK
02:35PM 2 FROM CERTAIN NUMBERS THAT IT MEANT THAT A BUNCH OF
02:35PM 3 PRESCRIPTIONS WEREN'T BEING MADE. IF THERE WAS A QUALIFIED
02:35PM 4 EXPERT WHO COULD HAVE DONE SOME SORT OF EPIDEMIOLOGICAL STUDY,
02:35PM 5 THAT WOULD BE THE PLACE FOR AN EXPERT WITNESS, BUT NOT TO
02:35PM 6 JUST SAY, "HERE'S SOME STUFF THAT HAPPENED IN MY PRACTICE IN
02:35PM 7 SAN ANGELO OVER THE LAST THREE YEARS." HOW DO WE TAKE THAT
02:35PM 8 AS A MEASURE OF HOW A STATEWIDE SYSTEM IS FUNCTIONING VERSUS
02:35PM 9 ALL OF THE DATA THAT WE'RE PROVIDING?

02:35PM 10 THE COURT: OKAY. WELL, I MEAN, DOES IT JUST GO TO
02:35PM 11 THE WEIGHT TO BE GIVEN TO WHATEVER THESE DOCTORS HAVE TO SAY?

02:35PM 12 MR. ECCLES: WELL, AND THEN AGAIN, IT COULD GO TO
02:36PM 13 THE WEIGHT BUT FOR THE FACT THAT WE'RE TALKING ABOUT THEM AS
02:36PM 14 EXPERT WITNESSES. AND THAT, BY RULE, GIVES THEM THE LEEWAY
02:36PM 15 TO BRING IN SUCH THINGS AS HEARSAY. TO GIVE WEIGHT TO THEIR
02:36PM 16 CONCLUSIONS, YES. IT ALSO MEANS THAT--I'LL BE BLUNT ABOUT
02:36PM 17 THIS--AS EXPERT WITNESSES, DO WE GET REPORTS FROM THEM?
02:36PM 18 HOW CAN YOU GET AN EXPERT WITNESS--

02:36PM 19 THE COURT: NORMALLY YOU WOULD.

02:36PM 20 MR. ECCLES: YOU WOULD.

02:36PM 21 THE COURT: YEAH.

02:36PM 22 MR. ECCLES: AND ALSO FROM THE DEFENDANTS'
02:36PM 23 STANDPOINT YOU GET SOMEBODY WHO IS IDENTIFIED AS AN EXPERT
02:36PM 24 WITNESS, DO I REALLY HAVE A CHOICE TO DO ANYTHING BUT DEPOSE
02:36PM 25 THEM? AND WHEN I GO TO DEPOSE THEM AND THEY SAY IN THEIR

02:36PM 1 DECLARATION THEY'RE NOT GONNA BILL THE PLAINTIFFS, BUT
02:36PM 2 THEN, YOU KNOW, A DAY AFTER THE DEPOSITION, I GET A BILL FOR
02:36PM 3 THOUSANDS OF DOLLARS, THE STATE HAS TO PAY THIS? AND THEY'RE
02:36PM 4 NOT AN EXPERT, BUT THEY'VE BEEN CALLED AN EXPERT, SO WE HAVE TO
02:37PM 5 DEPOSE THEM. THIS IS THE MESS THAT WE GET INTO. AND I WANT TO
02:37PM 6 JUST BRING THIS TO THE COURT'S ATTENTION. AND WE CAN TALK
02:37PM 7 ABOUT THIS. BUT IF YOU HAVE PEOPLE WHO ARE JUST OFFERING THEIR
02:37PM 8 OPINIONS ON THE STUFF THAT THEY'VE SEEN AND THEY WANT TO GRIPE
02:37PM 9 ABOUT IT, FINE. DON'T CALL THEM EXPERTS--

02:37PM 10 THE COURT: OKAY.

02:37PM 11 MR. ECCLES: --AND DON'T EXPECT THAT THE STATE IS
02:37PM 12 GOING TO PAY FOR THEM.

02:37PM 13 THE COURT: SO YOU'RE NOT OBJECTING TO THE COURT
02:37PM 14 CONSIDERING WHATEVER THESE DOCTORS HAVE TO SAY AND ASSESSING
02:37PM 15 WHATEVER WEIGHT TO GIVE TO THAT. YOUR OBJECTION IS THAT
02:37PM 16 THEY'RE NOT EXPERT WITNESSES BECAUSE THEIR OPINIONS ARE NOT
02:37PM 17 BASED ON SCIENTIFIC, TECHNICAL OR OTHER SPECIALIZED KNOWLEDGE
02:37PM 18 AND THEIR TESTIMONY IS NOT BASED ON FACTS OR DATA, IT'S NOT
02:38PM 19 THE PRODUCT OF RELIABLE PRINCIPLES AND METHODS, AND THE
02:38PM 20 WITNESSES--OR THE WITNESSES HAVE NOT PROPERLY APPLIED THE
02:38PM 21 PRINCIPLES AND METHODS. IT'S REALLY NOT A QUESTION OF
02:38PM 22 PRINCIPLES AND METHODS. YOUR POINT IS, NUMBER ONE, IT'S
02:38PM 23 NOT BASED ON SUFFICIENT FACTS OR DATA, IT'S JUST ISOLATED
02:38PM 24 INCIDENTS. RIGHT?

02:38PM 25 MR. ECCLES: YES. IT'S ALONG THE LINE--I CAN FIND

02:38PM 1 THIS CASE--AN EMERGENCY-ROOM DOCTOR TESTIFYING ABOUT WHAT
02:38PM 2 HAPPENED THAT NIGHT ISN'T AN EXPERT.

02:38PM 3 THE COURT: I DON'T KNOW.

02:38PM 4 MR. ECCLES: IT'S JUST WHAT HAPPENED AND HE HAS A
02:38PM 5 MEDICAL DEGREE.

02:38PM 6 THE COURT: BUT IT MIGHT BE EXPERT TESTIMONY IF HE'S
02:38PM 7 TALKING ABOUT--

02:38PM 8 MR. ECCLES: IF HE'S TALKING ABOUT STANDARDS OF
02:38PM 9 CARE, WHETHER HE MEDICALLY PERFORMED THE RIGHT PROCEDURES,
02:39PM 10 THINGS ALONG THAT LINE.

02:39PM 11 THE COURT: WHATEVER PROCEDURE HE PERFORMED, IF
02:39PM 12 HE'S EXPLAINING THAT, THAT'S BASED ON SPECIALIZED KNOWLEDGE.

02:39PM 13 MR. ECCLES: YES, IT IS. THAT'S NOT WHAT THEIR
02:39PM 14 TESTIMONY HERE IS ABOUT.

02:39PM 15 THE COURT: OKAY. I'LL JUST HAVE TO LOOK AT IT AND
02:39PM 16 SEE WHETHER IT'S EXPERT TESTIMONY OR NOT.

02:39PM 17 SO YOUR MOTION TO STRIKE IS TO STRIKE THEM AS
02:39PM 18 EXPERTS, NOT TO STRIKE WHATEVER THEY HAVE TO SAY ENTIRELY?

02:39PM 19 MR. ECCLES: I THINK--I THINK ONCE THEY'RE STRUCK
02:39PM 20 AS EXPERTS, EVERYTHING THAT THEY HAVE TO SAY IS ABSOLUTELY
02:39PM 21 IRRELEVANT TO THIS CLAIM.

02:39PM 22 THE COURT: OKAY.

02:39PM 23 MR. ECCLES: EVEN IF YOU DON'T STRIKE THEM AS
02:39PM 24 EXPERTS, I THINK IT'S STILL IRRELEVANT TO WHETHER THE STATE HAS
02:39PM 25 FULFILLED ITS OBLIGATIONS UNDER THE CORRECTIVE ACTION ORDER.

02:39PM 1 BUT WE'VE SEEN THIS BEFORE, THIS TYPE OF CREATION OF EXPERT
02:39PM 2 WITNESSES AND BRINGING THEM BEFORE THE COURT, AND WHAT I FEEL
02:39PM 3 IS AN IMPROPER EXTRAPOLATION TO HAVING JUST A HANDFUL OF PEOPLE
02:40PM 4 TESTIFY ABOUT THE MULTI-BILLION-DOLLAR AFFAIRS OF THE STATE OF
02:40PM 5 TEXAS. AND ANECDOTAL EVIDENCE IS JUST NOT ENOUGH TO CREATE
02:40PM 6 AN EXPERT WITNESS WITHOUT STUDIES, WITHOUT DATA, WITHOUT
02:40PM 7 FOUNDATION.

02:40PM 8 THE COURT: OKAY.

02:40PM 9 MR. ECCLES: THAT'S A DANGEROUS PRACTICE. SO,
02:40PM 10 TO YOUR QUESTION, IT CAN BE ADMISSIBLE AS AN OPINION OF AN
02:40PM 11 INDIVIDUAL, NOT AS AN EXPERT. BUT ONCE YOU GET THERE, IT'S
02:40PM 12 NOT RELEVANT TO THIS CLAIM.

02:40PM 13 THE COURT: OKAY. IT'S ANECDOTAL, IT'S HEARSAY--

02:40PM 14 MR. ECCLES: CONCLUSORY.

02:40PM 15 THE COURT: --IT'S NOT BASED ON ANY STUDIES--

02:40PM 16 MR. ECCLES: CORRECT.

02:40PM 17 THE COURT: --AND, THEREFORE, IT'S NOT EXPERT
02:40PM 18 TESTIMONY, AND ON TOP OF THAT, IT'S NOT ENTITLED TO ANY WEIGHT?

02:40PM 19 MR. ECCLES: CORRECT. BUT YOU ARE WELCOME TO READ
02:40PM 20 IT.

02:40PM 21 THE COURT: DO WHAT?

02:40PM 22 MR. ECCLES: BUT YOU ARE WELCOME TO READ IT.

02:40PM 23 THE COURT: OKAY. I WILL.

02:40PM 24 ALL RIGHT. LET'S SEE. OKAY, MR. GARRIGAN.

02:41PM 25 MR. GARRIGAN: AM I LIVE?

02:41PM 1 THE COURT: YES, YOU ARE.

02:41PM 2 MR. GARRIGAN: OKAY. OBVIOUSLY, I DISAGREE WITH
02:41PM 3 JUST ABOUT EVERYTHING HE SAID. I WOULD REFER THE COURT TO OUR
02:41PM 4 RESPONSE IN OPPOSITION. IN PARTICULAR, THE DEFENDANTS STRESS
02:41PM 5 WHAT I'M TOLD IS PRONOUNCED THE DAUBERT CASE, WHICH ACTUALLY
02:41PM 6 DEALT WITH THE FACTORS TO BE CONSIDERED IN JUDGING THE EXPERT
02:41PM 7 TESTIMONY IN A CASE INVOLVING THE APPLICATION OF OR THE
02:41PM 8 RELIABILITY OF A SCIENTIFIC THEORY. SOMETHING THAT STRICTLY
02:42PM 9 AND ACADEMICALLY REQUIRED THE APPLICATION OF SCIENTIFIC METHOD.
02:42PM 10 THAT IS NOT WHAT WE HAVE HERE. MOST OF THE CASES SINCE DAUBERT,
02:42PM 11 INCLUDING COMO, THE SIMMONS CASE FROM THE FIFTH CIRCUIT AND THE
02:42PM 12 PIPOTONE CASE FROM THE FIFTH CIRCUIT THAT WE'VE CITED IN THE
02:42PM 13 BRIEF, MAKE IT VERY CLEAR THAT, IN FACT, EXPERTS CAN VALIDLY
02:42PM 14 TESTIFY ABOUT, YOU KNOW, THINGS BASED ON THEIR EDUCATION, THEIR
02:42PM 15 EXPERIENCE, THEIR TRAINING, SPECIALIZED KNOWLEDGE, AS YOU'VE
02:42PM 16 SAID, TECHNICAL KNOWLEDGE THAT THEY MIGHT HAVE. IT CAN BE
02:42PM 17 BASED ON THEIR OBSERVATIONS, WHAT THEY HAVE SEEN. YOU KNOW,
02:42PM 18 IT'S--THE WHOLE QUESTION, I THINK, IS WHETHER THE EXPERT IS
02:43PM 19 USING THE SAME TYPE OF PROOF, THE SAME TYPE OF INFORMATION
02:43PM 20 THAT THEY USE TO MAKE DECISIONS IN THEIR RELEVANT FIELD OF
02:43PM 21 EXPERTISE. AND THAT'S WHAT WE HAVE HERE.

02:43PM 22 IF YOU LOOK AT THIS CASE, YOU KNOW, IT'S ABOUT
02:43PM 23 THE STATE SYSTEM OF, YOU KNOW, THE WAY THEY'RE SUPPOSED TO BE
02:43PM 24 PROVIDING MEDICAL CARE TO POOR CHILDREN. EVERYTHING THEY WANT
02:43PM 25 YOU TO HEAR HAS TO COME FROM THEIR BUREAUCRACY.

02:43PM 1 QUITE FRANKLY, A VERY IMPORTANT PART OF THIS PICTURE
02:43PM 2 IS THE DOCTORS TRYING TO TREAT THESE KIDS. I THINK THEIR
02:43PM 3 PERSPECTIVE IS EXTREMELY IMPORTANT. IT'S RELEVANT AND I THINK
02:43PM 4 IT'S VERY HELPFUL THAT THESE ARE, YOU KNOW, TREATING PHYSICIANS.
02:44PM 5 THEY MAKE DECISIONS ABOUT THEIR PRACTICES, THEY'RE INVOLVED IN
02:44PM 6 PROFESSIONAL ORGANIZATIONS. ONE OF THE PEOPLE THEY DON'T
02:44PM 7 WANT YOU TO LISTEN TO IS THE CHAIR OF THEIR FREW ADVISORY
02:44PM 8 COMMITTEE.

02:44PM 9 THE COURT: THE CHAIR OF WHAT?

02:44PM 10 MR. GARRIGAN: THE CHAIR OF THEIR FREW ADVISORY
02:44PM 11 COMMITTEE. THEY PUT THIS COMMITTEE TOGETHER. THEY COULD
02:44PM 12 PICK THE BEST AND THE BRIGHTEST IN THE STATE. THEY PICKED
02:44PM 13 DR. RIDER. AND THEY'RE ASKING YOU NOT TO PAY ANY ATTENTION
02:44PM 14 TO HER.

02:44PM 15 THE COURT: WELL, NO, I THINK MR. ECCLES IS NOT
02:44PM 16 ASKING TO STRIKE THEM AS WITNESSES, BUT TO STRIKE THEM AS
02:44PM 17 EXPERT WITNESSES.

02:44PM 18 MR. GARRIGAN: WELL, THE THING IS, THEY ARE OFFERING
02:44PM 19 TESTIMONY AND, BY THE WAY, THEY WERE GIVEN WRITTEN DECLARATIONS,
02:44PM 20 THE SAME DECLARATIONS WE'VE SUBMITTED TO THE COURT. YOU KNOW,
02:45PM 21 THAT'S NOT EXACTLY COMING IN WITHOUT A REPORT OR ANYTHING.
02:45PM 22 THESE PEOPLE--THEY'RE QUALIFIED BY THEIR TRAINING, THEIR
02:45PM 23 EXPERIENCE, THEIR PROFESSIONAL ACTIVITIES.

02:45PM 24 THE COURT: AS I UNDERSTAND IT, THERE'S NO OBJECTION
02:45PM 25 OR CHALLENGE TO THEIR QUALIFICATIONS AS PHYSICIANS.

02:45PM 1 MR. GARRIGAN: NO, I DON'T THINK THERE IS. BUT THE
02:45PM 2 FACT IS THEY ARE NOT FACT WITNESSES IN THAT THEY ARE GIVING
02:45PM 3 OPINIONS THAT ARE VALID OPINIONS BASED ON THEIR MEDICAL
02:45PM 4 EXPERTISE, THEIR EXPERIENCE IN THEIR PRACTICES. THEY HAVE--
02:45PM 5 DR. RIDER, IN PARTICULAR, YOU KNOW, IN 2007, THE COURT RELIED
02:45PM 6 ON HER EXPERT TESTIMONY EXPLICITLY. NOW THEY'RE--YOU KNOW,
02:45PM 7 BECAUSE THERE'S A DIFFERENT JUDGE ON THE BENCH, THEY WANT
02:46PM 8 YOU TO--THEY DON'T WANT YOU TO LISTEN TO HER.

02:46PM 9 THESE PEOPLE--DR. RIDER IS--SHE'S A PRACTICING
02:46PM 10 PEDIATRICIAN, SHE'S GOT A BIG PRACTICE, SHE TAKES CARE OF--
02:46PM 11 ALL OF THESE PEOPLE, ALL OF OUR EXPERTS HAVE--THEIR INTEREST
02:46PM 12 IN THIS CASE, IT'S NOT--THEY'RE CERTAINLY NOT INVOLVED IN
02:46PM 13 THIS CASE TO MAKE MONEY, ALTHOUGH IT'S PRETTY CLEAR THE STATE
02:46PM 14 DOESN'T LIKE THE IDEA OF PAYING THEM FOR THEIR TIME AS THE
02:46PM 15 RULES REQUIRE AND AS THIS COURT HAS ORDERED THEM TO DO. BUT
02:46PM 16 THEY HAVE A DEMONSTRATED INTEREST IN PROVIDING MEDICAL CARE TO
02:46PM 17 THE CLASS MEMBERS. ALL OF US IN THIS ROOM SHOULD HAVE THOSE
02:46PM 18 SAME INTERESTS AT HEART HERE. THAT'S WHAT THESE DOCTORS ARE
02:46PM 19 INTERESTED IN. THAT'S WHY THEY WERE ASKED TO TESTIFY AND
02:47PM 20 THAT'S WHY THEY DID.

02:47PM 21 THE COURT: I DON'T KNOW IF YOU BRIEFED THIS, BUT
02:47PM 22 WHAT'S THE BOTTOM LINE HERE? WHAT ARE THEIR FEES FOR THESE
02:47PM 23 DEPOSITIONS OR DECLARATIONS?

02:47PM 24 MR. GARRIGAN: THEY--I HAVE NO IDEA.

02:47PM 25 THE COURT: OH, OKAY.

02:47PM 1 MR. GARRIGAN: WE CAN PROBABLY TELL YOU THAT. YOU
02:47PM 2 KNOW, I THINK THAT IS WHAT THE--PART OF THE ISSUE HERE, THEY
02:47PM 3 DON'T WANT THEM TO GET PAID. THEY WANT THEM TO SORT OF BE
02:47PM 4 INSULTED ABOUT THEIR TIME.

02:47PM 5 LET'S SEE. OKAY. DR. WHITNEY, \$2250; DR. MAZUR,
02:47PM 6 \$2100; DR. RIDER, \$2055. I BELIEVE THERE WAS ONE MORE.

02:48PM 7 MS. SWANSON: YOUR HONOR, DR. WOOD IS AN EMPLOYEE OF
02:48PM 8 A STATE INSTITUTION AND SHE DECIDED IT WOULD BE TOO COMPLICATED
02:48PM 9 TO SUBMIT A BILL FOR HER SERVICES.

02:48PM 10 THE COURT: OKAY.

02:48PM 11 MS. SWANSON: ONLY THREE OF THEM ARE SEEKING PAYMENT.

02:48PM 12 THE COURT: SO ABOUT \$6,400.

02:48PM 13 MR. GARRIGAN: YEAH. BUT, QUITE FRANKLY, I THINK
02:48PM 14 THEIR OPINIONS--THEY'RE PROFESSIONALS, THEY'RE UNIQUELY
02:48PM 15 QUALIFIED, THEY WERE IN A UNIQUE POSITION, BASED ON THEIR
02:48PM 16 EXPERIENCE, TO TELL THIS COURT WHY THEIR PRESCRIPTION MEDICAL
02:48PM 17 SYSTEMS ARE NOT FUNCTIONING WELL. AND THAT'S--FRANKLY, THAT'S
02:48PM 18 THEIR AREA OF--THAT'S THE GIST OF THEIR TESTIMONY.

02:48PM 19 THE COURT: ARE THEY TELLING THE COURT WHY THE
02:49PM 20 MEDICAID PRESCRIPTION SYSTEM IS NOT FUNCTIONING OR SIMPLY THAT,
02:49PM 21 IN THEIR OBSERVATION, THEY HAVE SEEN INSTANCES WHERE IT DOESN'T
02:49PM 22 APPEAR TO BE FUNCTIONING, TO THEM?

02:49PM 23 MR. GARRIGAN: IN THEIR EXPERIENCE, THEY HAVE SEEN
02:49PM 24 AND EXPERIENCED INSTANCES WHERE THE SYSTEM DOES NOT WORK AND
02:49PM 25 NEEDS CORRECTION.

02:49PM 1 THE COURT: BUT THEY'RE NOT OFFERING TESTIMONY AS
02:49PM 2 TO THEIR EVALUATION OF THE SYSTEM AND "HERE'S WHAT NEEDS TO BE
02:49PM 3 FIXED"?

02:49PM 4 MR. GARRIGAN: NO, THEY ARE. THEY'RE TELLING THE
02:49PM 5 COURT, HERE'S THEIR EVALUATION OF THE SYSTEM FROM THEIR
02:49PM 6 PERSPECTIVE. ALL THEY CAN TELL YOU IS WHAT DOES NOT WORK AND
02:49PM 7 WHAT NEEDS FIXING. AND THEY ARE SAYING THAT. THEY'RE NOT
02:49PM 8 BUREAUCRATS. AND THIS--THEY PUT IN THEIR BRIEF, THE DEFENDANTS,
02:49PM 9 THAT NONE OF THESE EXPERTS HAVE EXPERTISE IN MEDICAID POLICY,
02:50PM 10 ALLOCATING RESOURCES FOR A PUBLIC HEALTH INSURANCE PROGRAM OR
02:50PM 11 MANAGING A DRUG FORMULARY. THE ONLY PEOPLE THAT ARE GONNA
02:50PM 12 MEET THOSE REQUIREMENTS ARE GONNA BE MEMBERS OF THE STATE'S
02:50PM 13 BUREAUCRACY.

02:50PM 14 THESE DOCTORS ARE INDEPENDENT, THEY HAVE NO INTEREST
02:50PM 15 IN THIS LITIGATION. THEY'VE GOT AN INTEREST IN TAKING CARE OF
02:50PM 16 THEIR PATIENTS. IF THE COURT FOLLOWS THEIR REASONING, THEY
02:50PM 17 WANT THE COURT TO BASE ALL ITS DECISIONS SOLELY ON THEIR
02:50PM 18 SELECTED, HANDPICKED--THE INFORMATION THEY CREATE ONLY FOR THE
02:50PM 19 PURPOSE OF PRESENTING TO THE COURT.

02:50PM 20 THROUGHOUT THIS CASE, THE COURT HAS RELIED ON THE
02:50PM 21 TESTIMONY OF PRACTITIONERS, YOU KNOW, USUALLY LEADERS IN THEIR
02:50PM 22 FIELD, AS ARE THESE PEOPLE, PEOPLE THAT ARE LOOKED UP TO,
02:50PM 23 PEOPLE WHO HAVE, YOU KNOW, NOT ONLY THEIR OWN BUSY PRACTICES,
02:51PM 24 BUT THEY'RE INVOLVED IN PROFESSIONAL ORGANIZATIONS, AND THEY
02:51PM 25 DO GAIN THE BENEFIT OF OTHER PEOPLE'S EXPERIENCE THAT WAY ALSO.

02:51PM 1 YOU KNOW, AND THEY ARE--THE DEFENDANTS, IN THEIR
02:51PM 2 BRIEF, THEY'RE VERY DISMISSIVE OF THE TESTIMONY OF THESE
02:51PM 3 PEOPLE. FOR INSTANCE, THEY COMPLAIN "THESE ARE JUST DOCTORS
02:51PM 4 LOOKING TO GRIPE." THAT'S NOT WHAT IT IS. THEY'RE DOCTORS
02:51PM 5 WHO ARE TELLING THE COURT WHAT WORKS AND WHAT DOESN'T WORK.

02:51PM 6 THE COURT: OKAY. BUT YOUR CONTENTION IS THAT
02:51PM 7 WHATEVER THEY'RE OFFERING IN THEIR DEPOSITIONS OR DECLARATIONS,
02:51PM 8 OR BOTH, IS BASED UPON SOME SORT OF SPECIALIZED KNOWLEDGE--

02:51PM 9 MR. GARRIGAN: YES. SPECIALIZED KNOWLEDGE,
02:52PM 10 EDUCATION--

02:52PM 11 THE COURT: --ABOUT THE MEDICAID PRESCRIPTION SYSTEM
02:52PM 12 IN TEXAS?

02:52PM 13 MR. GARRIGAN: YES. AND HOW IT IMPACTS THE TREATMENT
02:52PM 14 OF PATIENTS.

02:52PM 15 THE COURT: OKAY.

02:52PM 16 MR. GARRIGAN: AND I THINK THAT'S EXTREMELY IMPORTANT.
02:52PM 17 IN FACT, YOUR HONOR, IF THEIR SYSTEM IS WORKING AS THEY CLAIM
02:52PM 18 IT DOES, WHY AREN'T THEY BRINGING IN ACTUAL PRACTITIONERS TO
02:52PM 19 TELL THE COURT HOW WELL THAT SYSTEM IS WORKING? YOU KNOW, I'M
02:52PM 20 A LITTLE BIT SUSPICIOUS OF THAT. I IMAGINE A LOT OF PEOPLE
02:52PM 21 HAVE A LOT OF PROBLEMS WITH THE WAY THEY RUN THE PROGRAM.

02:52PM 22 THE COURT: WELL, THE STATE MAY HAVE A DIFFERENT
02:52PM 23 CONCEPT OF HOW TO PERSUADE THE COURT THAT THE STATE HAS
02:52PM 24 SATISFIED THIS CORRECTIVE ACTION ORDER.

02:52PM 25 MR. GARRIGAN: THAT'S VERY TRUE. I WOULD THINK

02:53PM 1 THAT THAT'S A PART OF THE PICTURE THAT SHOULD BE CONSIDERED.

02:53PM 2 THE COURT: WHAT DOCTORS HAVE TO SAY?

02:53PM 3 MR. GARRIGAN: WHAT THE ACTUAL--YOU KNOW, WHERE
02:53PM 4 THE RUBBER MEETS THE ROAD. WHAT IS HAPPENING OUT THERE WHERE
02:53PM 5 PEOPLE ARE ACTUALLY TRYING TO PROVIDE CARE TO THESE CHILDREN,
02:53PM 6 YES.

02:53PM 7 THE COURT: OKAY.

02:53PM 8 MR. GARRIGAN: I THINK WHEN YOU LOOK THROUGH THE
02:53PM 9 BRIEFS, IF YOU WILL COMPARE THEIR CHARACTERIZATION OF THE
02:53PM 10 EXPERTS' TESTIMONY TO THE ACTUAL TRANSCRIPTS--I'D LIKE TO BRING
02:53PM 11 YOUR ATTENTION TO ONE SPECIFIC ONE THAT JUST JUMPED OUT AT ME.
02:53PM 12 THEY SAID THAT ALL OF THESE EXPERTS CONCEDED THAT THEY HAD NO
02:53PM 13 EXPERTISE IN MEDICAID POLICY. AND I WENT TO THE PAGES OF THEIR
02:54PM 14 TRANSCRIPTS TO SEE WHAT QUESTIONS THEY WERE ASKED AND ANSWERED.
02:54PM 15 IN FACT, THE ONLY QUESTIONS THEY WERE ASKED WERE:

02:54PM 16 DO YOU HAVE EXPERTISE IN RUNNING A PUBLIC INSURANCE
02:54PM 17 PROGRAM?

02:54PM 18 DO YOU HAVE EXPERIENCE IN ALLOCATING RESOURCES FOR
02:54PM 19 A PUBLIC INSURANCE PROGRAM?

02:54PM 20 DO YOU HAVE EXPERTISE IN RUNNING OR MANAGING A
02:54PM 21 DURABLE MEDICAL-EQUIPMENT COMPANY?

02:54PM 22 DO YOU HAVE EXPERTISE IN CREATING OR ENFORCING
02:54PM 23 MEDICAID POLICY?

02:54PM 24 NOW, THOSE QUESTIONS--FIRST OF ALL, THEY COULD ONLY
02:54PM 25 BE ANSWERED IN THE AFFIRMATIVE BY THEIR OWN BUREAUCRATS.

02:54PM 1 THE SECOND THING IS, THEY WERE NOT ASKED WHAT THEIR
02:54PM 2 EXPERTISE IN MEDICAID POLICY WAS. AND AS I SAID, IT IS THEIR
02:55PM 3 ABILITY TO IDENTIFY FOR THE COURT THE PROBLEMS THAT THEY
02:55PM 4 ENCOUNTER IN TRYING TO TREAT PATIENTS.

02:55PM 5 I'D ALSO LIKE TO FOLLOW UP--THE BRIEFS WILL EXPLAIN
02:55PM 6 THIS. THIS NOT BEING A JURY TRIAL, THE COURT'S DUTY AS A
02:55PM 7 GATEKEEPER FOR EXPERT WITNESSES IS JUST NOT NECESSARILY AS
02:55PM 8 ROBUST AS IT WOULD BE IN A JURY CASE. AND THAT HAS BEEN
02:55PM 9 RECOGNIZED REPEATEDLY. I THINK IF YOU LOOK AT THE CASES--AS
02:55PM 10 I THINK YOU'VE BEEN SAYING, IT GOES TO THE WEIGHT, NOT TO THE
02:55PM 11 ADMISSIBILITY.

02:55PM 12 ONE OF THEIR COMPLAINTS THAT YOU HAVE HEARD ABOUT
02:55PM 13 NOW IS THAT THESE EXPERTS DID NOT SPEAK TO WHETHER OR NOT
02:56PM 14 THE DEFENDANTS WERE VIOLATING THE CORRECTIVE ACTION ORDER IN
02:56PM 15 PARTICULAR. AND THAT'S JUST IRONIC. IN THE PAST WHEN EXPERTS
02:56PM 16 HAVE DONE THAT IN THIS CASE, THEY COMPLAINED THAT THEY WERE
02:56PM 17 TRYING TO SPEAK TO THE ULTIMATE ISSUES BEFORE THE COURT.

02:56PM 18 OUR EXPERTS ARE RESPECTFUL. THEY UNDERSTAND WHERE
02:56PM 19 THOSE LINES ARE AND WHAT YOU HAVE TO DO AND WHAT THEIR ROLE IS
02:56PM 20 HERE. THAT'S ABOUT ALL I HAVE TO SAY ON THAT.

02:56PM 21 I WOULD, IF I COULD, THROW MY TWO CENTS IN ON SOME
02:56PM 22 EXCHANGE THAT YOU HAD THIS MORNING, IN PARTICULAR ABOUT WHAT
02:56PM 23 I THINK IS THEIR STRATEGY FOR THIS CASE. AND I THINK IT'S
02:56PM 24 EXTREMELY IMPORTANT. IT GOES TO THE CORE NOT ONLY OF THIS
02:56PM 25 CASE BUT OF ANY--YOU KNOW, ANY INJUNCTION THAT'S OUT THERE. I

02:57PM 1 THINK THEY ARE TRYING TO GET THE COURT TO DIVIDE THE CORRECTIVE
02:57PM 2 ACTION ORDER AND THE DECREE UP INTO DISCRETE BITS AND PIECES
02:57PM 3 AND TO LOOK AT THOSE DISCREET BITS AND PIECES IN ISOLATION,
02:57PM 4 AND THEN, FOR INSTANCE, HERE THEY'RE SAYING, "OH, WE ONLY WANT
02:57PM 5 TO GET RID OF PARAGRAPHS 129 AND 130. WE'RE NOT TRYING TO GET
02:57PM 6 RID OF PARAGRAPHS 3 OR 190." THE FACT IS THEY ARE TRYING TO
02:57PM 7 GET RID OF PARAGRAPHS 3 AND 190. THOSE SPECIFIC PROVISIONS
02:57PM 8 IN PARAGRAPHS 29 AND 30 [SIC] HAVE TO BE READ IN LIGHT OF THE
02:57PM 9 OBJECTIVES OF THE DECREE THAT ARE EMBODIED BY PARAGRAPHS 3 AND
02:57PM 10 190.

02:57PM 11 BY ASKING THE COURT TO LOOK AT THE MORE SPECIFIC
02:58PM 12 PROVISIONS IN ISOLATION AND ELIMINATE THOSE FROM THE DECREE
02:58PM 13 WITHOUT TAKING INTO CONSIDERATION THE OBJECTIVES OF THE DECREE,
02:58PM 14 THEY ARE, IN FACT, TAKING ANY MEANING OUT OF THOSE BROADER
02:58PM 15 PROVISIONS. I THINK THAT VIOLATES, YOU KNOW, JUST ABOUT--I
02:58PM 16 THINK A LOT OF THE CASES I HAVE READ AND WE HAVE CITED NOT ONLY
02:58PM 17 IN THIS CASE BUT IN OTHER BRIEFS WE'VE FILED--AND I WOULD ALSO
02:58PM 18 LIKE TO MENTION THE RESTATEMENT OF CONTRACTS SECOND, SECTION
02:58PM 19 202. YOU KNOW, THESE DOCUMENTS WE'RE TALKING ABOUT--AND I
02:58PM 20 THINK IT IS THE DECREE AND THE CORRECTIVE ACTION ORDER--THEY'RE
02:58PM 21 TO BE READ AS A WHOLE. MEANING IS SUPPOSED TO BE GIVEN TO ALL
02:58PM 22 OF THE LANGUAGE. IF THEY ARE PICKING OFF THE MORE SPECIFIC
02:59PM 23 PROVISIONS AND THEN YOU END UP WITH ONLY PARAGRAPHS 3 AND 190,
02:59PM 24 THOSE ARE GOING TO BE MEANINGLESS, BECAUSE THERE'S NOT GONNA BE
02:59PM 25 ANY WAY TO ATTAIN THOSE OBJECTIVES. AND I WOULD JUST URGE THE

02:59PM 1 COURT TO CONSIDER--WHENEVER IT INTERPRETS THE MEANING OF ANY
02:59PM 2 LANGUAGE IN THE DECREE, PLEASE CONSIDER THE OBJECTIVE THAT
02:59PM 3 THE PARTIES AGREED TO IN THE DECREE.

02:59PM 4 I THINK THE CORRECTIVE ACTION ORDER, YES, THAT DID
02:59PM 5 DIVIDE THE DECREE INTO DIFFERENT SUBJECT-MATTER AREAS, AND I
02:59PM 6 THINK THAT WAS FOR MANAGEMENT PURPOSES. QUITE FRANKLY, I THINK
02:59PM 7 EVERYBODY WAS TRYING TO HELP THE DEFENDANTS AND SAY, "IF YOU
03:00PM 8 CAN FOCUS IN GOOD FAITH AND DO YOUR BEST ON THESE AREAS,
03:00PM 9 HOPEFULLY YOU'RE GONNA BE ABLE TO MEET THE REQUIREMENTS OF THE
03:00PM 10 DECREE AND THE OBJECTIVES OF THE DECREE." THEY HAVEN'T DONE
03:00PM 11 THAT. THEY'VE DONE THEIR BARE MINIMUM. AND I THINK THE COURT
03:00PM 12 WILL REACH THE SAME CONCLUSION IF YOU WILL GIVE THE MEANING TO
03:00PM 13 THE BROADER PROVISIONS ABOUT THE OBJECTIVES OF THE DECREE THAT
03:00PM 14 I THINK THEY ARE DUE.

03:00PM 15 THE COURT: WELL, I THINK THE DIFFERENCE BETWEEN THE
03:00PM 16 TWO SIDES HERE IS, MR. GARRIGAN, YOU BELIEVE THAT THE STATE HAS
03:00PM 17 AN OBLIGATION NOT ONLY TO FULFILL WHAT THEY AGREED THEY WOULD
03:00PM 18 DO IN THE CORRECTIVE ACTION ORDER WHERE THE CORRECTIVE ACTION
03:00PM 19 ORDER SAYS THE STATE WILL DO SOMETHING, BUT ALSO THAT THE STATE
03:00PM 20 HAS AN OBLIGATION TO ENSURE THAT MEDICAID PRESCRIPTION-DRUG
03:01PM 21 SERVICES ARE GUARANTEED TO THOSE WHO ARE ENTITLED TO THEM.
03:01PM 22 AND THOSE TWO PARAGRAPHS, 190 AND 3, TALK ABOUT WHAT MEDICAID
03:01PM 23 RECIPIENTS ARE ENTITLED TO. THEY'RE ENTITLED TO TIMELY RECEIPT
03:01PM 24 OF EPSDT SERVICES, THEY'RE ENTITLED TO ALL NEEDED FOLLOW-UP
03:01PM 25 HEALTHCARE SERVICES. AND THAT'S WHAT THE LAW SAYS.

03:01PM 1 AND THE QUESTION IS: IS THE STATE IN A POSITION
03:01PM 2 HERE WHERE IT MUST GUARANTEE THAT THAT ACTUALLY OCCURS OR IS
03:01PM 3 THE STATE REQUIRED TO DO WHAT IT PROMISED TO DO IN THE DECREE
03:01PM 4 AND THE CORRECTIVE ACTION ORDER AND MAKE ITS BEST EFFORTS TO
03:02PM 5 ENSURE THAT PHARMACISTS UNDERSTAND THE PROGRAM? AND, YOU KNOW,
03:02PM 6 IT'S KIND OF LIKE YOU CAN LEAD A HORSE TO WATER, BUT YOU CAN'T
03:02PM 7 MAKE IT DRINK.

03:02PM 8 MR. GARRIGAN: WELL, I KNOW THAT'S THEIR VIEW. AND,
03:02PM 9 QUITE FRANKLY, I DON'T UNDERSTAND IT. AND THEY PROBABLY DON'T
03:02PM 10 UNDERSTAND HOW I THINK THE WAY I DO. I DON'T UNDERSTAND HOW
03:02PM 11 ANYBODY WOULD THINK THAT IF PROPERLY PRESENTED TO MOSTLY THE
03:02PM 12 GUARDIANS OF THESE CHILDREN THAT THESE SERVICES ARE AVAILABLE
03:02PM 13 TO THEM THAT THEY WOULD TURN THEM DOWN. I THINK--I THINK THERE
03:02PM 14 ARE A LOT OF ROADBLOCKS PUT UP. AND IT'S--YOU KNOW, EVERY
03:02PM 15 LITTLE THING THEY DO--AND I DON'T MEAN TO DEMEAN IT, BUT IT
03:02PM 16 COULD BE DONE--IT COULD BE DONE EFFECTIVELY. FOR INSTANCE,
03:03PM 17 THIS WHOLE MANAGED-CARE LAYER THAT THEY HAVE KIND OF PUT
03:03PM 18 OVER EVERYTHING, THAT PROBABLY HAS SOME BENEFIT. AND I
03:03PM 19 DON'T--THAT'S THEIR DISCRETION. QUITE FRANKLY, THAT'S FINE.
03:03PM 20 BUT IT ALSO HAS THE POSSIBILITY OF CREATING ANOTHER LAYER OR
03:03PM 21 TWO OF BUREAUCRACY THAT MAKES THE SYSTEM LESS EFFECTIVE. THEY
03:03PM 22 SHOULD AT LEAST BE ON THE LOOKOUT FOR THAT. I THINK THERE ARE
03:03PM 23 THINGS THE STATE COULD DO BETTER.

03:03PM 24 BUT TO GET BACK TO THE, YOU KNOW, DECREE, IF--YOU
03:03PM 25 KNOW, WE'RE NOT SAYING THE STATE HAS TO PERFECTLY DELIVER

03:03PM 1 THESE SERVICES TO EVERY PERSON. I DON'T THINK THAT'S WHAT'S
03:03PM 2 REQUIRED. I THINK THEY HAVE TO BE IN SUBSTANTIAL COMPLIANCE.
03:04PM 3 I THINK THEY NEED TO MAKE THESE SERVICES AVAILABLE TO
03:04PM 4 EVERYBODY. THERE SHOULDN'T BE ROADBLOCKS THERE. IF THEY CAN
03:04PM 5 SEE WHERE THERE ARE NO--WHERE THERE ARE BOTTLENECKS, YOU KNOW,
03:04PM 6 THEY SHOULD REMOVE THEM. AS JUDGE JUSTICE HAD RECOGNIZED
03:04PM 7 REPEATEDLY, THERE WERE MANY STATE-CREATED BARRIERS TO GETTING
03:04PM 8 THESE SERVICES. AND IT'S ALL A MATTER OF, REALLY, HOW THE
03:04PM 9 STATE APPROACHES IT, WHETHER THEY WANT TO DO THEIR BEST TO
03:04PM 10 PROVIDE THESE OR NOT.

03:04PM 11 IT'S NOT A MATTER OF US SAYING THEY HAVE TO DO
03:04PM 12 THIS STUFF PERFECTLY. WE UNDERSTAND THAT'S UNREASONABLE.
03:04PM 13 AND, QUITE FRANKLY, THE LAW DOES. THAT'S WHY IT LOOKS FOR
03:04PM 14 SUBSTANTIAL COMPLIANCE, NOT ABSOLUTE COMPLIANCE. I THINK WE'RE
03:04PM 15 BEING QUITE REASONABLE ABOUT THAT. OR WE'RE CERTAINLY WILLING
03:05PM 16 TO, IF THEY'LL MAKE SOME EFFORT.

03:05PM 17 BUT WHEN YOU'VE GOT, IN THIS INSTANCE, MORE THAN
03:05PM 18 HALF OF THE PHARMACISTS NOT--NEVER PROVIDING THE 72-HOUR
03:05PM 19 MEDICATIONS OR PRESCRIPTIONS EVEN WHEN, YOU KNOW, THE STATE
03:05PM 20 HAS IDENTIFIED, YOU KNOW, "NO, YOU GUYS ARE FILLING ENOUGH
03:05PM 21 PRESCRIPTIONS THAT YOU SHOULD BE"--YOU KNOW, "WE EXPECT THERE
03:05PM 22 TO BE MORE OF THESE 72-HOUR PRESCRIPTIONS ON YOUR RECORDS."
03:05PM 23 THAT'S A BIG PROBLEM. HALF OF THEM. IT'S A BIG PROBLEM FOR
03:05PM 24 THE PEOPLE THAT ARE AFFECTED. I DON'T THINK IT'S TOO BIG A
03:05PM 25 PROBLEM FOR THE STATE TO ADDRESS. AND IT CAN MAKE A BIG, BIG

03:05PM 1 DIFFERENCE TO THE CLASS MEMBERS.

03:05PM 2 AS I SAID, I'M--THEY'RE IN A POSITION WHERE THEY'RE
03:06PM 3 CREATING PRETTY MUCH ALL THE EVIDENCE THAT THE COURT GETS TO
03:06PM 4 HEAR. FORTUNATELY, THE DECREE AND THE CORRECTIVE ACTION ORDERS
03:06PM 5 HAVE SOME PROVISIONS THAT REQUIRE THEM TO REPORT ON SPECIFIC
03:06PM 6 DISCREET MATTERS THAT WERE NEGOTIATED OVER AND HAMMERED OUT.
03:06PM 7 AND I THINK THERE IS SOME SOURCE OF SOME FAIRLY OBJECTIVE
03:06PM 8 INFORMATION. BUT WHEN THE DEFENDANTS ARE FREE TO SIMPLY
03:06PM 9 DESCRIBE THEIR OWN EFFORTS AS BEING HEROIC AND, YOU KNOW, IT'S
03:06PM 10 NOT THEIR FAULT, IT'S THE PHARMACISTS, IT'S THE DOCTORS, IT'S
03:06PM 11 THE CLASS MEMBERS, YOU KNOW, I THINK THOSE WERE THE VIEWS THAT
03:06PM 12 HAD BEEN--HAD BEEN REJECTED FOR A LONG TIME, BECAUSE THERE
03:06PM 13 WERE OBVIOUSLY MORE EFFORTS THEY COULD BE MAKING. AND, QUITE
03:07PM 14 FRANKLY, YOU KNOW, WITH PRESSURE FROM THE COURT, THEY'VE MADE
03:07PM 15 A LOT OF IMPROVEMENT. BUT I THINK THERE'S MORE TO BE DONE.

03:07PM 16 THE COURT: OKAY.

03:07PM 17 MR. GARRIGAN: THANK YOU.

03:07PM 18 THE COURT: THANK YOU, MR. GARRIGAN.

03:07PM 19 ALL RIGHT. I'LL TRY TO GET AN ORDER OUT TO YOU,
03:07PM 20 AND A DECISION, AS SOON AS POSSIBLE.

03:07PM 21 I UNDERSTAND YOU ARE ALREADY IN THE PROCESS OF
03:07PM 22 BRIEFING OPPOSING MOTIONS ON ANOTHER CORRECTIVE ACTION ORDER,
03:07PM 23 AND THAT IS CORRECTIVE ACTION ORDER 637-9, AND THAT IS THE--
03:08PM 24 LET'S SEE WHERE I'VE GOT IT HERE--ADEQUATE SUPPLY OF HEALTHCARE
03:08PM 25 PROVIDERS.

03:08PM 1 MR. ECCLES: YES.

03:08PM 2 THE COURT: OKAY. SO WHAT HAS BEEN FILED SO FAR
03:08PM 3 ON THAT ONE ARE DOCKET NUMBERS 1033, WHICH IS THE PLAINTIFFS'
03:08PM 4 RENEWED MOTION TO ENFORCE THE PROVIDER SUPPLY CORRECTIVE ACTION
03:08PM 5 ORDER 637-9 AND RELATED DECREE PROVISIONS; AND DOCUMENT NUMBER
03:08PM 6 1052, WHICH IS THE STATE'S RESPONSE; AND RULE 60(B)(5) MOTION
03:08PM 7 TO--THIS SAYS "MOTION TO DISMISS." LET'S SEE. IT WILL BE A
03:08PM 8 MOTION FOR RELIEF FROM JUDGMENT, I GUESS. DID YOU CALL IT A
03:08PM 9 MOTION TO DISMISS? NO. MOTION FOR RELIEF FROM JUDGMENT.
03:09PM 10 YEAH. OKAY.

03:09PM 11 I BELIEVE YOU'RE STILL BRIEFING THESE CROSS-MOTIONS.
03:09PM 12 AS A MATTER OF FACT, I THINK THE PLAINTIFFS ASKED FOR AN
03:09PM 13 EXTENSION OF TIME TO OCTOBER 30TH TO PERHAPS RESPOND TO THE
03:09PM 14 STATE'S MOTION FOR RELIEF FROM JUDGMENT, AND I THINK I HAVE AN
03:09PM 15 AGREED ORDER IN THERE. I THINK THE STATE HAS AGREED TO THAT.

03:09PM 16 SO, GOING PAST OCTOBER 30TH AND LOOKING AT MY
03:09PM 17 CALENDAR AND JUST ANTICIPATING THAT ONE SIDE OR THE OTHER MAY
03:10PM 18 FILE A REQUEST FOR AN ORAL-ARGUMENT HEARING--I THINK YOU FILED
03:10PM 19 THE REQUEST FOR THIS HEARING, MR. ECCLES. IS THAT CORRECT?
03:10PM 20 DO YOU RECALL?

03:10PM 21 MR. ECCLES: I DON'T RECALL, BUT IF I DIDN'T, I
03:10PM 22 WOULD HAVE.

03:10PM 23 THE COURT: OKAY. I THINK YOU DID. ALL RIGHT.

03:10PM 24 SO, LOOKING PAST OCTOBER 30TH AND THEN, ACTUALLY,
03:10PM 25 IF THE STATE--OR IF THE PLAINTIFFS RESPOND TO THE STATE'S RULE

03:10PM 1 60(B)(5) MOTION ON OCTOBER 30TH, I DON'T KNOW IF THE STATE IS
03:10PM 2 GOING TO WANT TO REPLY TO THAT. PROBABLY. OKAY. SO WHERE
03:10PM 3 WOULD THAT PUT US, END OF NOVEMBER? THE MIDDLE OF NOVEMBER,
03:10PM 4 AT LEAST, IF THERE'S A SUR REPLY.

03:10PM 5 MR. GARRIGAN: YEAH. AND I WOULD JUST LIKE TO POINT
03:10PM 6 OUT THESE THINGS HAVE AN ODD WAY, IN THIS CASE, OF EXPANDING.
03:10PM 7 I BELIEVE THEIR RESPONSIVE MOTION IS OVER A HUNDRED PAGES LONG.
03:10PM 8 SO THAT'S WHY I NEEDED TO ASK FOR MORE TIME. SO I DON'T KNOW
03:11PM 9 IF WE'RE GONNA BE ABLE TO STICK TO THE STANDARD 10-DAY RESPONSE
03:11PM 10 TIME.

03:11PM 11 THE COURT: OKAY. WELL, I WAS LOOKING AT
03:11PM 12 MID-DECEMBER. THE PROBLEM IS, I HAVE A TRIAL STARTING DECEMBER
03:11PM 13 3RD THAT'S GOING TO BE A THREE-WEEK TRIAL. SO IF I FINISH IT
03:11PM 14 EARLY OR IF THE CASE SETTLES, I COULD SCHEDULE A HEARING ON
03:11PM 15 CORRECTIVE ACTION ORDER 637-9 AND THE CROSS-MOTIONS ON THAT
03:11PM 16 DURING THE WEEK OF DECEMBER 16TH. AND I WANTED TO RUN THAT
03:11PM 17 BY YOU AND SEE WHAT YOUR SCHEDULES WERE.

03:11PM 18 THE PROBLEM I HAVE IN 2014 IS, IN JANUARY, I HAVE
03:11PM 19 EIGHT CASES SET FOR TRIAL AND A MARKMAN HEARING IN A PATENT
03:11PM 20 CASE.

03:11PM 21 IN FEBRUARY, I HAVE SENTENCINGS, ANOTHER MARKMAN
03:12PM 22 HEARING, OUR COURT'S JUDGES' MEETING, AND THREE MORE CASES SET
03:12PM 23 FOR JURY TRIAL, ONE OF WHICH IS A THREE-WEEK CASE THAT WILL
03:12PM 24 TAKE ME INTO MARCH.

03:12PM 25 SO I WAS GOING TO TRY TO SET A HEARING ON CAO 637-9

03:12PM 1 IN MID-DECEMBER. WHAT DO YOU THINK ABOUT THAT?

03:12PM 2 MS. HALPERN: THAT DATE WOULD BE FINE WITH THE STATE,
03:12PM 3 YOUR HONOR.

03:12PM 4 THE COURT: OKAY. IT WOULD BE--YOU KNOW, I COULD
03:12PM 5 JUST PICK A DAY DURING THE WEEK OF DECEMBER 16TH. I MEAN, I
03:12PM 6 COULD GO THE WEEK EARLIER THAN THAT, BUT I DON'T KNOW THAT I'LL
03:12PM 7 BE FINISHED WITH THIS TRIAL UNLESS IT SETTLES. IF IT SETTLES,
03:12PM 8 I COULD CERTAINLY HOLD A HEARING. SO THIS HEARING WOULD BE
03:12PM 9 SUBJECT TO A CASE I ALREADY HAVE SET FOR TRIAL. IF THAT CASE
03:12PM 10 GOES TO TRIAL AND I'M STILL IN THE TRIAL ON THE DATE THAT I
03:12PM 11 SET THIS HEARING, I'LL HAVE TO RESET THIS HEARING.

03:13PM 12 MS. HALPERN: THAT'S UNDERSTANDABLE. THAT'S FINE.

03:13PM 13 THE COURT: ALL RIGHT.

03:13PM 14 WHAT IS YOUR SITUATION, MS. SWANSON, DURING THE WEEK
03:13PM 15 OF DECEMBER 16TH? AND MR. GARRIGAN.

03:13PM 16 MS. SWANSON: I DON'T HAVE ANY CONFLICTS, YOUR HONOR,
03:13PM 17 THAT WEEK.

03:13PM 18 THE COURT: OKAY.

03:13PM 19 MR. GARRIGAN?

03:13PM 20 MR. GARRIGAN: I DON'T KNOW. I THINK AT THIS POINT,
03:13PM 21 THOUGH, I COULD CERTAINLY CLEAR OUT WHICHEVER DAY YOU PICK.
03:13PM 22 IF YOU PICK ONE, I'LL MAKE EVERY EFFORT TO DO THAT.

03:13PM 23 THE COURT: ALL RIGHT. YOU KNOW, SUPPOSE MAYBE--
03:13PM 24 GIVE ME ABOUT TWO AND A HALF WEEKS ON THIS CIVIL CASE THAT'S
03:13PM 25 SUPPOSED TO LAST THREE WEEKS. I WOULD SUGGEST WE SET A HEARING

03:13PM 1 ON THE MOTIONS THAT ARE PENDING AND THAT YOU ARE STILL BRIEFING
03:13PM 2 ON, SAY, DECEMBER 18TH OR 19TH.

03:14PM 3 MS. HALPERN: THAT WOULD BE IDEAL.

03:14PM 4 THE COURT: ALL RIGHT. I'LL JUST PICK A DAY AND
03:14PM 5 SAY DECEMBER 19TH. THAT WILL GIVE ME A LITTLE MORE TIME ON
03:14PM 6 THE TRIAL. THAT'S A THURSDAY.

03:14PM 7 OKAY. I'LL ISSUE AN ORDER SETTING DOCKET NUMBERS
03:14PM 8 1033 AND 1052 FOR ORAL ARGUMENT AND ANY EVIDENCE YOU WANT TO
03:14PM 9 PRESENT ON THURSDAY, DECEMBER 19TH, 2013, AT 9:00.

03:15PM 10 AND IT'S PROBABLY A MOOT ISSUE, BUT IN YOUR BRIEFING
03:15PM 11 THERE WAS SOME DISCUSSION ABOUT TRYING TO RESOLVE THE DISPUTE
03:15PM 12 OVER CORRECTIVE ACTION ORDER 637-8, WHICH IS WHAT WE HAD THE
03:15PM 13 HEARING ON TODAY, AND THE STATE HAD PROPOSED SOMETHING AND
03:15PM 14 WANTED THE PLAINTIFFS TO AGREE TO TERMINATE CAO 637-8 IN
03:15PM 15 JANUARY. IN YOUR BRIEFING REFERRING TO JANUARY OF "2013,"
03:15PM 16 DID YOU MEAN JANUARY OF 2014?

03:16PM 17 MS. SWANSON: NO, I THINK THEY MEANT JANUARY OF
03:16PM 18 2013. AND THAT WAS PART OF OUR THINKING THAT THIS REALLY DID
03:16PM 19 NOT GIVE OUR CLIENTS ANY SUBSTANTIAL VALUE. IT WAS A COUPLE OF
03:16PM 20 MONTHS.

03:16PM 21 THE COURT: SO IT WAS THE BEGINNING OF THIS YEAR OR
03:16PM 22 LATE LAST YEAR THAT YOU WERE NEGOTIATING THIS?

03:16PM 23 MS. SWANSON: THAT'S CORRECT.

03:16PM 24 THE COURT: OKAY.

03:16PM 25 MR. ECCLES: I THINK IT WAS MERELY THE POINT THAT

03:16PM 1 WE HAD ASKED THEM DURING THE CONFERENCE PERIOD FOLLOWING THE
03:16PM 2 CONCLUSION THAT WE WANTED TO ROLL OUT SOME MORE EDUCATIONAL
03:16PM 3 INFORMATION TO PHARMACISTS IF THEY WOULD PLEASE AGREE THAT THIS
03:16PM 4 CORRECTIVE ACTION ORDER WAS DONE AND WE WOULD HAVE ALL OF THAT
03:16PM 5 ROLLED OUT BY JANUARY OF 2013. THEY DIDN'T AGREE. WE ROLLED
03:16PM 6 IT OUT ANYWAY. AND HERE WE ARE.

03:16PM 7 THE COURT: OKAY. LET ME SEE IF THERE'S ANYTHING
03:16PM 8 ELSE. I DON'T THINK SO. OKAY.

03:17PM 9 OH, I DO HAVE ONE QUESTION. THE WAY THESE ARE BEING
03:17PM 10 FILED, THESE CROSS-MOTIONS, IS THE PLAINTIFFS ARE FILING A
03:17PM 11 MOTION TO ENFORCE A CORRECTIVE ACTION ORDER, THE STATE IS
03:17PM 12 RESPONDING WITH A MOTION TO DISSOLVE THE CORRECTIVE ACTION
03:17PM 13 ORDER.

03:17PM 14 NOW, FOR EXAMPLE, THE CORRECTIVE ACTION ORDER WHICH
03:17PM 15 WAS THE SUBJECT OF TODAY'S HEARING, THE EVENTS--THE DISCRETE
03:17PM 16 EVENTS THAT THE STATE WAS REQUIRED TO SATISFY, WHICH IS MAINLY,
03:17PM 17 OH, WORKING WITH THE TEXAS PHARMACY ASSOCIATION; PUTTING IN
03:17PM 18 PLACE AN AUTOMATED--WELL, YOU ALREADY HAD THE AUTOMATED SYSTEM;
03:17PM 19 CONDUCTING THE TWO ANALYSES. THOSE WERE OVER WITH IN EARLY
03:17PM 20 2012, OR SOMETIME IN 2012. IF THEY WERE CONCLUDED IN 2012, WAS
03:18PM 21 THE STATE CONTENT TO LEAVE THE CAO IN PLACE AND JUST WAIT AND
03:18PM 22 SEE WHAT HAPPENED? OR I'M JUST CURIOUS AS TO--AND MAYBE YOU
03:18PM 23 DON'T WANT TO TELL ME, BUT IT WOULD SEEM LIKE THE STATE WOULD
03:18PM 24 BE FILING MOTIONS UNDER 60(B)(5) AS SOON AS THE STATE FELT THAT
03:18PM 25 IT SATISFIED THE CORRECTIVE ACTION ORDER. BUT, INSTEAD, THE

03:18PM 1 MOTION ACTUALLY CAME FROM THE PLAINTIFFS AND THEN YOU RESPONDED
03:18PM 2 WITH YOUR MOTION FOR RELIEF FROM JUDGMENT.

03:18PM 3 MR. ECCLES: WELL, I THINK THAT THAT GOES TO THE
03:18PM 4 STATE'S POSITION THAT IT WILL ALWAYS TRY TO TALK TO THE
03:18PM 5 PLAINTIFFS AND SAY, "HAVEN'T WE SATISFIED EVERYTHING?" THERE'S
03:18PM 6 GOING TO BE A CONFERENCE PERIOD THAT RUNS, AND THERE'S THE
03:18PM 7 PERSISTENT HOPE THAT WE'LL BE ABLE TO COME TO SOME SORT OF
03:18PM 8 AGREEMENT AND AT LEAST NARROW DOWN THE EVENTS THAT WOULD
03:18PM 9 COME BEFORE THE COURT. IT JUST HASN'T HAPPENED YET.

03:19PM 10 THE COURT: MAYBE YOU WERE DOING THAT IN 2012 ON
03:19PM 11 THIS CAO.

03:19PM 12 MR. ECCLES: IT'S VERY LIKELY. OR THAT WE WERE
03:19PM 13 STACKED UP BEHIND SOME OTHER CORRECTIVE ACTION ORDER THAT WE
03:19PM 14 WERE BRIEFING AT THE TIME AND, WHEN WE GOT DONE WITH THAT,
03:19PM 15 WE SAID, "LET'S TALK ABOUT THE PRESCRIPTION, NONPRESCRIPTION,
03:19PM 16 MEDICAL EQUIPMENT CORRECTIVE ACTION ORDER. CAN WE DO ANYTHING
03:19PM 17 WITH THAT?"

03:19PM 18 THE COURT: ALL RIGHT.

03:19PM 19 ANYTHING FURTHER, MS. SWANSON?

03:19PM 20 MS. SWANSON: NO, YOUR HONOR.

03:19PM 21 THE COURT: MR. ECCLES, ANYTHING FURTHER?

03:19PM 22 MR. ECCLES: I DON'T WANT TO KEEP THIS HEARING GOING
03:19PM 23 ON ANY LONGER, IT'S JUST I CAN FEEL THE WEIGHT OF THOUSANDS OF
03:19PM 24 HHSC EMPLOYEES WHEN MR. GARRIGAN SAID THAT HHSC COULD FIX SO
03:19PM 25 MANY PROBLEMS WITH MEDICAID IF THEY WERE WILLING TO MAKE SOME

03:19PM 1 EFFORT. I'M EXTREMELY PROUD OF MY CLIENT AND THE EMPLOYEES
03:19PM 2 WHO WORK TIRELESSLY AND MAKE A CAREER OUT OF TRYING TO MAKE
03:20PM 3 THE LIVES AND MEDICAL SERVICES OF THE INDIGENT BETTER. I'M
03:20PM 4 OFFENDED BY THAT REMARK. BUT I JUST NEEDED TO SAY THAT ON THE
03:20PM 5 RECORD.

03:20PM 6 THE COURT: VERY WELL.

03:20PM 7 OKAY. WE'LL RECESS. YOU ARE EXCUSED. I'LL SEE
03:20PM 8 YOU, HOPEFULLY, IN DECEMBER.

03:20PM 9 MS. SWANSON: THANK YOU, YOUR HONOR.

03:20PM 10 THE COURT: OKAY. THANK YOU.

03:20PM 11 YOU ARE EXCUSED. THANK YOU.

12 -----

13
14 COURT REPORTER'S CERTIFICATE

15 I CERTIFY THAT PAGES 1 THROUGH 173 CONTAIN A CORRECT
16 TRANSCRIPT FROM THE RECORD OF PROCEEDINGS.

17 OCTOBER 19, 2013.

18


20 JERRY KELLEY, CRR

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